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TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1937

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No. 773

ÆTNA INSURANCE COMPANY, PETITIONER,

vs.

UNITED FRUIT COMPANY

No. 774

UNION MARINE & GENERAL INSURANCE COMPANY, LTD., FORMERLY UNION MARINE INSURANCE COMPANY, LTD., PETITIONER,

vs.

UNITED FRUIT COMPANY

No. 775

BOSTON INSURANCE COMPANY, PETITIONER,

vs.

UNITED FRUIT COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 8, 1938.

CERTIORARI GRANTED MARCH 14, 1938.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 773

ÆTNA INSURANCE COMPANY, PETITIONER,

vs.

UNITED FRUIT COMPANY.

No. 774

UNION MARINE & GENERAL INSURANCE COMPANY, LTD., FORMERLY UNION MARINE INSURANCE COMPANY, LTD., PETITIONER,

vs.

UNITED FRUIT COMPANY

No. 775

BOSTON INSURANCE COMPANY, PETITIONER,

vs.

UNITED FRUIT COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

L 57-271

ÆTNA INSURANCE COMPANY, Plaintiff-Appellant and Appellee,

against

UNITED FRUIT COMPANY, Defendant-Appellee and Appellant

L 57-272

UNION MARINE & GENERAL INSURANCE COMPANY, LTD., Formerly Union Marine Insurance Company, Ltd., Plaintiff-Appellant and Appellee,

against

UNITED FRUIT COMPANY, Defendant-Appellee and Appellant

L 57-273

BOSTON INSURANCE COMPANY, Plaintiff-Appellant and Appellee,

against

UNITED FRUIT COMPANY, Defendant-Appellee and Appellant

(Cross Appeals)

STATEMENT ON APPEAL

The above three actions were commenced by the service of summonses and verified complaints upon the defendant in April, 1934.

[fol. 2] Issues were joined by the service of verified answers on September 10, 1934.

The actions came on and were consolidated for trial before Hon. Robert P. Patterson, District Judge and a jury of one, on October 30, 1936. At the close of the trial both sides moved for directed verdicts. On December 12, 1936, the court rendered its decision directing a verdict in favor of the plaintiffs Ætna Insurance Company for $2,132.76,

Union Marine & General Insurance Co., Ltd., formerly Union Marine Insurance Co., Ltd. for $710.92, and Boston Insurance Company for $1,777.29, all amounts to bear interest from November 28, 1932. Judgments were entered on March 10, 1937, in favor of Ætna Insurance Company for $2,782.51, Union Marine & General Insurance Co., Ltd., formerly Union Marine Insurance Co., Ltd. for $925.68, and Boston Insurance Company for $2,265.96. The appeals were allowed by order of Hon. Alfred C. Coxe on April 3, 1937.

The plaintiffs appear by Bigham, Englar, Jones & Houston, their attorneys, whose offices are maintained at 99 John Street, New York City, N. Y. and the defendant appears by Kirlin, Campbell, Hickox, Keating & McGrann having their offices at 120 Broadway, New York City, N. Y.

There has been no change of parties or attorneys.

[fol. 3] In United States District Court, Southern District of New York

Docket Entries

L 57-271

Ætna Ins. Co.

v.

United Fruit Co.

April 9, 1934. Filed præcipe and issued summons.

April 18, 1934. Filed complaint and summons.

April 18, 1934. Filed notice of appearance.

September 11, 1934. Filed answer of defendant.

March 29, 1935. Filed notice of change of address Kirlin, Campbell, Hickox, Keating & McGrann.

October 30, 1936. Before Patterson, J.—Tried with L 57-272 and L 57-273. Trial begun and concluded. Decision reserved.

December 12, 1936. Filed stipulation of facts.

December 12, 1936. Filed one volume of testimony. (See L 57-272 and L 57-273.)

December 12, 1936. Filed opinion #10217. Directed verdict for plaintiff—Patterson, J.

March 4, 1937. Filed stipulation and order amending stenographer's minutes of trial nunc pro tunc as indicated. Patterson, J. (See L 57-272 and L 57-273.)

March 5, 1937. Filed bill of costs taxed at $102.35.

March 10, 1937. Filed judgment 36859 in favor of plaintiff for $2,782.51.

Plaintiff's Appeal

April 8, 1937. Filed petition for appeal and order allowing appeal. Coxe, J.

April 8, 1937. Filed notice of appeal.

April 8, 1937. Filed assignment of errors.

April 8, 1937. Filed stipulation waiving supersedeas bond.

April 9, 1937. Filed citation—Ret. 5/1/37.

[fol. 4] Defendant's Appeal

April 22, 1937. Filed stipulation waiving supersedeas bond.

April 23, 1937. Filed petition and order allowing appeal. Patterson, J.

April 23, 1937. Filed notice of appeal.

April 23, 1937. Filed assignment of errors.

L 57-272

UNION MARINE, ETC.,

v.

UNITED FRUIT CO.

April 9, 1934. Filed præcipe and issued summons.

April 18, 1934. Filed complaint and summons.

April 18, 1934. Filed notice of appearance.

September 11, 1934. Filed answer of defendant.

March 29, 1935. Filed notice of change of address Kirlin, Campbell, Hickox, Keating & McGrann.

October 30, 1936. Before Patterson, J. Tried with L 57-271 and L 57-273. Trial begun and concluded. Decision reserved.

December 12, 1936. Filed stipulation of facts.

December 12, 1936. Filed supplemental stipulation of facts.

December 12, 1936. Filed one volume of testimony (filed under L 57-271).

December 12, 1936. Filed opinion #10217. Directed verdict for plaintiff. Patterson, J.

March 4; 1937. Filed order amending stenographer's minutes (filed under L 57-271).

March 5, 1937. Filed bill of costs taxed at $32.30.

March 10, 1937. Filed judgment 36858 in favor of plaintiff for $925.68.

[fol. 5] Plaintiff's Appeal

April 8, 1937. Filed petition and order allowing appeal. Coxe, J.

April 8, 1937. Filed notice of appeal.

April 8, 1937. Filed assignment of errors.

April 8, 1937. Filed stipulation waiving supersedeas bond.

April 9, 1937. Filed citation—Ret. 5/1/37.

Defendant's Appeal

April 22, 1937. Filed stipulation waiving supersedeas bond.

April 22, 1937. Filed petition and order allowing appeal. Paterson, J.

April 22, 1937. Filed notice of Appeal.

April 22, 1937. Filed assignment of errors.

L 57-273

Boston Ins. Co.

v.

United Fruit Co.

April 9, 1934. Filed præcipe and issued summons.

April 18, 1934. Filed complaint and summons.

April 18, 1934. Filed notice of appearance.

September 11, 1934. Filed answer of defendant.

March 29, 1935. Filed notice of change of address Kirlin, Campbell, Hickox, Keating & McGrann.

October 30, 1936. Before Paterson, J.—Tried with L 57-271 and L 57-272. Trial begun and concluded. Decision reserved.

[fol. 6] December 12, 1936. Filed stipulation of facts.

December 12, 1936. Filed supplemental stipulation of facts.

December 12, 1936. Filed one volume of testimony (filed under L 57-271).

December 12, 1936. Filed opinion #10217. Directed verdict for plaintiff. Patterson, J.

March 4, 1937. Filed order amending stenographer's minutes (filed under L 57-271).

March 5, 1937. Filed bill of costs taxed at $32.50.

March 10, 1937. Filed judgment #36859 in favor of plaintiff for $2,265.96.

Plaintiff's Appeal

April 8, 1937. Filed petition and order allowing appeal. Coxe, J.

April 8, 1937. Filed notice of appeal.

April 8, 1937. Filed assignment of errors.

April 8, 1937. Filed stipulation waiving supersedeas bond.

April 9, 1937. Filed citation—Ret. 5/1/37.

Defendant's Appeal

April 22, 1937. Filed stipulation waiving supersedeas bond.

April 23, 1937. Filed petition and order allowing appeal. Patterson, J.

April 23, 1937. Filed notice of appeal.

April 23, 1937. Filed assignment of errors.

[fol. 7] In United States District Court

[Title omitted]

Summons in Ætna Insurance Company Action

To the above-named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the

complaint is not served with this summons, to serve a notice of appearance on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable, John C. Knox, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, this 9th day of April A. D. 1934.

Charles Weiser, Clerk.

Bigham, Englar, Jones & Houston, Plaintiff's Attorneys, Office and Post Office Address, 64 Wall St., Borough of Manhattan, City of New York. (Seal.)

[fol. 8] IN UNITED STATES DISTRICT COURT

[Title omitted]

COMPLAINT IN ÆTNA INSURANCE COMPANY ACTION

Plaintiff complains of defendant and alleges:

1. The ground upon which the jurisdiction of this Court depends, is diversity of citizenship. At all times hereinafter mentioned, plaintiff was, and now is, a corporation organized and existing under and by virtue of the laws of the State of Connecticut, and a citizen and inhabitant of said State, having an office and place of business at No. 89 Maiden Lane, County, Southern District and State of New York; and defendant was, and now is, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, and a citizen and inhabitant of that State.

2. The matter in controversy herein, exceeds, exclusive of interest and costs, the sum of $3,000.

3. On or about May 1, 1918, plaintiff issued its valued policy of insurance upon the S. S. "Almirante", wherein and whereby it insured defendant, as owner of the said ves-
[fol. 9] sel, against loss by collision and certain other perils in the amount of $18,978 for one year from said date. In

and by said policy it was expressly provided and agreed that said vessel was valued at $632,610. The defendant also procured other policies of similar tenor, the aggregate of which, together with the amount carried by the defendant as self-insurer, amounted to $632,610.

4. On or about September 6, 1918, and while said policy was still in full force and effect, said vessel was in collision with the S. S. "Hisko", and became a total loss by reason of said collision.

5. Thereafter defendant abandoned the "Almirante" to the hull underwriters, including plaintiff, and claimed the sum insured in payment of a total loss.

6. On or about December 5, 1918, plaintiff accepted said abandonment and paid to defendant the sum insured, namely, $18,978, being payment in full of defendant's claim for the total loss of said vessel under said policy.

7. Upon information and belief, thereafter defendant brought suit against the owner of the S. S. "Hisko" and recovered $1,761,693.02, being the value of the S. S. "Almirante" and her equipment insured under the said policy mentioned in paragraph 3. Defendant's legal and other expenses in respect of said litigation and recovery amounted to $300,024.53, leaving a net recovery of $1,461,669.49, of which defendant has paid to plaintiff $9,489 on September 28, 1932, and $7,356.24 on November 28, 1932, in all $16,845.24.

[fol. 10] 8. The net amount recovered by defendant from the owner of the "Hisko" for the loss of the "Almirante", namely, $1,461,668.49, is more than double the amount at which said vessel was valued by agreement between plaintiff and defendant in the policy of insurance issued by plaintiff to defendant, as set forth in paragraph 3 hereof. If such net recovery of $1,461,668.49 is distributed pro rata among all the said underwriters, in the proportion their policies bear to the insured value of $632,610, the plaintiff is entitled to receive $43,850.04 as its share of the net recovery, less $16,845.24.

9. If the share of the recovery due to the plaintiff is limited to reimbursement, then the plaintiff is entitled to receive, as its share of the recovery, the amount it paid to

defendant, namely, $18,978, with interest thereon as follows: on $18,978 from December 16, 1918 to September 28, 1932; on $9,489 from September 28, 1932 to November 28, 1932; and on $2,132.76 from November 28, 1932, less $16,845.24.

Wherefore, plaintiff demands judgment against the defendant for $27,004.80 with interest and costs, and for such other relief as may be just.

Bigham, Englar, Jones & Houston, Attorneys for Plaintiff, 64 Wall Street, New York, N. Y.

[fol. 11] *Duly sworn to by Martin Detels. Jurat omitted in printing.*

[fol. 12] In United States District Court

[Title omitted]

Answer in Ætna Insurance Company Action

The defendant, answering the complaint herein, alleges as follows:

1. It denies that it has any knowledge or information sufficient to form a belief as to the organization of the plaintiff. It admits the other allegations contained in Paragraph 1 of the complaint.

2. It admits the allegations contained in Paragraph 2 of the complaint.

3. It admits the allegations contained in Paragraph 3 of the complaint, but for greater accuracy and completeness refers to the original policy of insurance which is in the custody of the plaintiff.

4. It admits the allegations contained in Paragraph 4 of the complaint.

5. It admits the allegations contained in Paragraph 5 of the complaint. A copy of the notice of abandonment is attached hereto marked Schedule "A".

[fol. 13] 6. It denies that the hull underwriters, including the plaintiff, accepted said abandonment.

It admits the other allegations contained in Paragraph 6 of the complaint.

7. It admits that thereafter it brought suit against the owner of the S. S. "Hisko" and recovered $1,761,693.02, being the actual value of the S. S. "Almirante" and her equipment, partially insured in the said policy mentioned in Paragraph 3 of the complaint. It admits the allegations contained in the second sentence of Paragraph 7 of the complaint.

8. It admits the allegations contained in Paragraph 8 of the complaint.

9. It denies the allegations contained in Paragraph 9 of the complaint.

Further Answering, Defendant Alleges:

10. In addition to the policies of insurance referred to in Paragraph 3 of the complaint, the defendant also, in accordance with the customary practice, procured other policies of insurance upon the S. S. "Almirante" for increased valuation in the sum of £65,105, which additional insurance covered only against total and/or constructive total loss and was permitted by the terms of the hull policies.

11. The S. S. "Hisko" which collided with the S. S. "Almirante", as alleged in Paragraph 4 of the complaint, was owned by the United States of America.

[fol. 14] 12. Thereafter the defendant and the various hull underwriters, including the plaintiff herein, jointly retained attorneys to prosecute the claim for damages occasioned by the said loss of the S. S. "Almirante" against the United States of America as owner of the S. S. "Hisko".

13. The said attorneys, pursuant to their retainer and by instructions from the defendant and the hull underwriters, including the plaintiff herein, procured the passage of a Special Act of Congress authorizing suit on the part of the owner of the S. S. "Almirante", against the United States of America. No recovery against the United States could have been had without a Special Act of Congress. Said act of Congress, known as Private Law No. 398, was enacted by the 69th Congress, Second Session, s. 2899, duly approved

by the President of the United States of American on February 26, 1927, and entitled "An Act for the Relief of the Owner of the American Steamship Almirante, etc.". This Act provided that any amount recovered against the United States of America for the loss of the S. S. "Almirante" should be without interest. Without this proviso the Act could not have been obtained.

Copy of said Act is annexed hereto, marked Schedule "B".

14. Thereafter said attorneys, pursuant to their retainer by the defendant and the hull underwriters, including the plaintiff, and by their express instructions, filed a suit in the name of the owner of the S. S. "Almirante" in the United States District Court for the Southern District of New York against the United States of America as owner of the S. S. "Hisko" under the Special Act of Congress [fol. 15] referred to above, and recovered the sum of $1,761,693.02 as the actual value of the S. S. "Almirante" and her equipment at the time of her loss. Payment of this judgment was received by the said attorneys on July 26, 1932. In accordance with the provisions of the Act of Congress under which the suit was brought, no interest was allowed on the recovery and no interest was in fact recovered.

15. The necessary legal and other expenses incurred in respect to said litigation, after deduction of taxable costs recovered, amounted to $300,024.53, leaving a net recovery of $1,461,668.49. A portion of said recovery was paid over by said attorneys to Johnson & Higgins, average adjusters, for distribution to the various underwriters; the balance of said net recovery was paid over by said attorneys to the defendant herein. As soon as the proper calculations could be made, Messrs. Johnson & Higgins paid to the plaintiff as its share of said net recovery, the amounts as alleged in Paragraph 7 of the complaint.

16. The sum of $16,845.24 which was paid to the plaintiff as alleged in Paragraph 7 of the complaint was arrived at as follows: Plaintiff was credited with the amount of its payment to the defendant, pursuant to the terms of its policy of insurance (after deduction of plaintiff's proportion of amount received on sale of lifeboats recovered), in the net amount of $18,963.00; to this sum was added the amount of bank interest earned thereon from the date on which the

judgment was paid by the United States until the plaintiff received payment of its share thereof, amounting to $39.98; from this total was subtracted the plaintiff's proportion [fol. 16] of legal fees and other expenses amounting to $2,157.74.

17. The premium paid by the defendant to the plaintiff for its policy of insurance on the S. S. "Almirante" was based upon the proportion of the agreed value of the S. S. "Almirante" amounting to $632,610.00, specifically stated in plaintiff's valued policy, and not upon that proportion of the actual value of said vessel as determined in the suit which resulted in the recovery as aforesaid.

18. Plaintiff has received in full the total amount to which it is entitled under its rights of subrogation.

Wherefore, the defendant demands that the complaint herein be dismissed, with costs, and such other and further relief as may be just.

Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for Defendant, Office and P. O. Address, 27 William Street, Borough of Manhattan, City of New York.

Duly sworn to by Arthur E. Nicholson. Jurat omitted in printing.

[fol. 17] SCHEDULE "A", ANNEXED TO ANSWER IN ÆTNA INSURANCE COMPANY ACTION

October 25, 1918.

Ætna Insurance Company:

"Almirante"

You have already been advised that this vessel was in collision with the Steamer "Hisco" on September 6, 1918, and was sunk.

The owners are of the opinion that she cannot be saved, or that if she be saved, the cost of saving her with the damage sustained will exceed a moiety of her value.

They have, therefore, instructed us to abandon to you all their right, title and interest in and to the said vessel as far as insured by you under your policy No. 6315 for $18,-

978.00 valued at $632,610, and to claim from you as for a total loss the sum insured. This we hereby do.

Yours truly, Johnson & Higgins, (Sgd.) J. P. Nelson, Manager, Adjusting Department.

[fol. 18] SCHEDULE "B", ANNEXED TO ANSWER IN ÆTNA INSURANCE COMPANY ACTION

"*Be it enacted, etc.*, That the claim of the owner of the American Steamship *Almirante* and the claims of the owners of cargo laden aboard thereof, against the United States of America for damages and loss alleged to have been caused by collision between said steamship and the U. S. S. *Hisko*, on or about the 6th day of September, 1918, off the coast of the State of New Jersey, may be sued for by the owner of the said steamship *Almirante* and the said owners of cargo in the District Court of the United States for the Southern District of New York, sitting as a court of admiralty and acting under the rules governing such court; and the said court shall have jurisdiction to hear, consider, and determine such suits and to enter judgments or decrees for the amounts of such damages and costs, if any, as shall be found to be due against the United States in favor of the owner of the said steamship *Almirante* and said owners of cargo or against the owner of the said steamship *Almirante* and said owners of cargo, in favor of the United States, upon the same principles and measures of liability as in like suits in admiralty between private parties, and with the same rights of appeal, except that no interest shall be paid on any claim; Provided, That such notices of the suits shall be given to the Attorney General of the United States as may be provided by orders of the said court, and it shall be the duty of the Attorney General to cause the United States attorney in such district to appear and defend for the United States; *Provided further*, That said suits shall be brought and commenced within four months of the date of the passage of this act."

[fol. 19] IN UNITED STATES DISTRICT COURT

[Title omitted]

SUMMONS IN UNION MARINE, ETC., ACTION

To the above-named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable, John C. Knox, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, this 9th day of April A. D. 1934.

Charles Weiser, Clerk.

Bigham, Englar, Jones & Houston, Plaintiff's Attorneys, Office and Post Office Address, 64 Wall St., Borough of Manhattan, City of New York. (Seal.)

[fol. 20] IN UNITED STATES DISTRICT COURT

[Title omitted]

COMPLAINT IN UNION MARINE, ETC., ACTION

Plaintiff complains of defendant and alleges:

1. The ground upon which the jurisdiction of this Court depends, is diversity of citizenship. At all the times hereinafter mentioned, plaintiff was, and now is, a corporation organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Northern Ireland, having an office and place of business at No. 116 John Street, County, Southern District, and State of New York; and defendant was, and now is, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, and a citizen and inhabitant of that State.

2. The matter in controversy herein, exceeds, exclusive of interest and costs, the sum of $3,000.

3. On or about May 1, 1918, plaintiff issued its valued policy of insurance upon the S. S. "Almirante", wherein [fol. 21] and whereby it insured defendant, as owner of the said vessel, against loss by collision and certain other perils in the amount of $6,326 for one year from said date. In and by said policy it was expressly provided and agreed that said vessel was valued at $632,610. The defendant also procured other policies of similar tenor, the aggregate of which, together with the amount carried by the defendant as self-insurer, amounted to $632,610.

4. On or about September 6, 1918, and while said policy was still in full force and effect, said vessel was in collision with the S. S. "Hisko", and became a total loss by reason of said collision.

5. Thereafter defendant abandoned the "Almirante" to the hull underwriters, including plaintiff, and claimed the sum insured in payment of a total loss.

6. On or about January 2, 1919, plaintiff accepted said abandonment and paid to defendant the sum insured, namely, $6,326, being payment in full of defendant's claim for the total loss of said vessel under said policy.

7. Upon information and belief, thereafter defendant brought suit against the owner of the S. S. "Hisko" and recovered $1,761,693.02, being the value of the S. S. "Almirante" and her equipment insured under the said policy mentioned in paragraph 3. Defendant's legal and other expenses in respect of said litigation and recovery amounted to $300,024.53, leaving a net recovery of $1,461,668.49, of which defendant has paid to plaintiff $3,163 on September 28, 1932, and $2,452.08 on November 28, 1932, in all $5,615.08.

[fol. 22] 8. The net amount recovered by defendant from the owner of the "Hisko" for the loss of the "Almirante", namely, $1,461,668.49, is more than double the amount at which said vessel was valued by agreement between plaintiff and defendant in the policy of insurance issued by plaintiff to defendant, as set forth in paragraph 3 hereof. If such net recovery of $1,461,668.49 is distributed pro rata

among all the said underwriters, in the proportion their policies bear to the insured value of $632,610, the plaintiff is entitled to receive $14,616.68 as its share of the net recovery, less $5,615.08.

9. If the share of the recovery due to the plaintiff is limited to reimbursement, then the plaintiff is entitled to receive, as its share of the recovery, the amount it paid to defendant, namely, $6,326, with interest thereon as follows: on $6,326 from December 16, 1918 to September 28, 1932; on $3,163 from September 28, 1932 to November 28, 1932; and on $710.82 from November 28, 1932, less $5,615.08.

Wherefore, plaintiff demands judgment against the defendant for $9,001.60, with interest and costs, and for such other relief as may be just.

Bigham, Englar, Jones & Houston, Attorneys for Plaintiff, 64 Wall Street, New York, N. Y.

[fol. 23] *Duly sworn to by Martin Detels. Jurat omitted in printing.*

[fol. 24] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER IN UNION MARINE, ETC., ACTION

The defendant, answering the complaint herein, alleges as follows:

1. It denies that it has any knowledge or information sufficient to form a belief as to the organization of the plaintiff. It admits the other allegations contained in Paragraph 1 of the complaint.

2. It admits the allegations contained in Paragraph 2 of the complaint.

3. It admits the allegations contained in Paragraph 3 of the complaint, but for greater accuracy and completeness refers to the original policy of insurance which is in the custody of the plaintiff.

4. It admits the allegations contained in Paragraph 4 of the complaint.

5. It admits the allegations contained in Paragraph 5 of the complaint. A copy of the notice of abandonment is [fol. 25] attached hereto, marked Schedule "A".

6. It denies that the hull underwriters, including the plaintiff, accepted said abandonment.
It admits the other allegations contained in Paragraph 6 of the complaint.

7. It admits that thereafter it brought suit against the owner of the S. S. "Hisko" and recovered $1,761,693.02, being the actual value of the S. S. "Almirante" and her equipment, partially insured in the said policy mentioned in Paragraph 3 of the complaint. It admits the allegations contained in the second sentence of Paragraph 7 of the complaint.

8. It admits the allegations contained in Paragraph 8 of the complaint.

9. It denies the allegations contained in Paragraph 9 of the complaint.

Further Answering, Defendant Alleges:

10. In addition to the policies of insurance referred to in Paragraph 3 of the complaint, the defendant also, in accordance with the customary practice, procured other policies of insurance upon the S. S. "Almirante" for increased valuation in the sum of £65,105, which additional insurance covered only against total and/or constructive total loss and was permitted by the terms of the hull policies.

11. The S. S. "Hisko", which collided with the S. S. "Almirante", as alleged in Paragraph 4 of the complaint, [fol. 26] was owned by the United States of America.

12. On or about the 28th day of January, 1919, the plaintiff paid to defendant the amount of $6,326.00 on account of the total loss of said vessel under Policy No. 351, under and pursuant to the following subrogation agreement:

"To the Union Marine Insurance Company, Limited, New York.

DEAR SIRS:

In consideration of your paying our claim for Total loss on Hull of 'Almirante' (S) and insured under policy No. 351, we hereby assign to you all of our rights and claims to any sum or sums of money to the extent of but not exceeding $6326. which may be payable to, or recoverable by us, or in our names, in respect of the undermentioned interest, whether on account of Salvage therefrom or on any other account whatever, and we authorize you to use our names in any action or proceedings you may be advised to bring with respect to any of the above mentioned matters and we undertake ourselves to do or concur in any matters or proceedings which you may deem expedient or necessary in any such action or proceedings and generally to assist therein by all means in our power. We further undertake if called upon by you so to do ourselves to undertake any such action or proceedings as you may direct on your behalf, it being understood that you are to indemnify us against any costs, charges or expenses to be incurred in respect of any proceedings to the extent of but not ex-
[fol. 27] ceeding $6326.—taken by virtue of this agreement.

Signed in duplicate this 28th day of January, 1919.

United Fruit Company, by (Signed) John W. Damon, Treasurer.

Description of Interest Above Referred To:

Above steamer sunk in collision September 6th, 1918. Our file 12183."

13. Thereafter, the defendant and the various hull underwriters, including the plaintiff herein, jointly retained attorneys to prosecute the claim for damages occasioned by the said loss of the S. S. "Almirante" against the United States of America, as owner of the S. S. "Hisko".

14. The said attorneys, pursuant to their retainer and by instructions from the defendant and the hull underwriters, including the plaintiff herein, procured the passage of a Special Act of Congress authorizing suit on the part of the owner of the S. S. "Almirante" against the United States of America. No recovery against the United States

could have been had without a Special Act of Congress. Said Act of Congress, known as Private Law No. 398, was enacted by the 69th Congress, Second Session, s. 2899, duly approved by the President of the United States of America on February 26, 1927, and entitled "An Act for the Relief of the Owner of the American Steamship 'Almirante', etc.". This Act provided that any amount recovered against the United States of America for the loss of the S. S. "Almirante" should be without interest. Without this proviso, [fol. 28] the Act could not have been obtained.

Copy of said Act is annexed hereto, marked Schedule "B".

15. Thereafter, said attorneys, pursuant to their retainer by the defendant and the hull underwriters, including the plaintiff, and by their express instructions, filed a suit in the name of the owner of the S. S. "Almirante" in the United States District Court for the Southern District of New York against the United States of America, as owner of the S. S. "Hisko", under the Special Act of Congress referred to above, and recovered the sum of $1,761,693.02 as the actual value of the S. S. "Almirante" and her equipment at the time of her loss. Payment of this judgment was received by the said attorneys on July 26, 1932. In accordance with the provisions of the Act of Congress under which the suit was brought, no interest was allowed on the recovery and no interest was in fact recovered.

16. The necessary legal and other expenses incurred in respect to said litigation, after deduction of taxable costs recovered, amounted to $300,024.53, leaving a net recovery of $1,461,668.49. A portion of said recovery was paid over by said attorneys to Johnson & Higgins, average adjusters, for distribution to the various underwriters; the balance of said net recovery was paid over by said attorneys to the defendant herein. As soon as the proper calculations could be made, Messrs. Johnson & Higgins paid to the plaintiff as its share of said net recovery the amounts as alleged in Paragraph 7 of the complaint.

[fol. 29] 17. The sum of $5,615.08 which was paid to the plaintiff, as alleged in Paragraph 7 of the complaint, was arrived at as follows: Plaintiff was credited with the amount of its payment to the defendant, pursuant to the terms of its policy of insurance (after deduction of plaintiff's pro-

portion of amount received on sale of lifeboats recovered) in the net amount of $6,321.00; to this sum was added the amount of bank interest earned thereon from the date on which the judgment was paid by the United States until the plaintiff received payment of its share thereof, amounting to $13.33; from this total was subtracted the plaintiff's proportion of legal fees and other expenses amounting to $719.25.

18. The premium paid by the defendant to the plaintiff for its policy of insurance on the S. S. "Almirante" was based upon the proportion of the agreed value of the S. S. "Almirante" amounting to $632,610.00, specifically stated in plaintiff's valued policy, and not upon that proportion of the actual value of said vessel as determined in the suit which resulted in the recovery as aforesaid.

19. Plaintiff has received in full the total amount to which it is entitled under its rights of subrogation.

Wherefore, the defendant demands that the complaint herein be dismissed, with costs, and such other and further relief as may be just.

Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for Defendant, Office & P. O. Address, 27 William Street, Borough of Manhattan, City of New York.

[fol. 30] *Duly sworn to by Arthur E. Nicholson. Jurat omitted in printing.*

SCHEDULE A, ANNEXED TO ANSWER IN UNION MARINE, ETC., ACTION

(This schedule is identical in substance with Schedule A, Annexed to Answer in Ætna Insurance Company Action, printed herein at p. 17.)

SCHEDULE B, ANNEXED TO ANSWER IN UNION MARINE, ETC., ACTION

(This schedule is identical with Schedule B, Annexed to Answer in Ætna Insurance Company action, printed herein at p. 18.)

[fol. 31] IN UNITED STATES DISTRICT COURT

[Title omitted]

SUMMONS IN BOSTON INSURANCE COMPANY ACTION

To the above-named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable, John C. Knox, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, this 9th day of April, A. D. 1934.

Charles Weiser, Clerk.

Bigham, Englar, Jones & Houston, Plaintiff's Attorneys, Office and Post Office Address, 64 Wall St., Borough of Manhattan, City of New York. (Seal.)

[fol. 32] IN UNITED STATES DISTRICT COURT

[Title omitted]

COMPLAINT IN BOSTON INSURANCE COMPANY ACTION

Plaintiff complains of defendant and alleges:

1. The ground upon which the jurisdiction of this Court depends is diversity of citizenship. At all the times hereinafter mentioned, plaintiff was, and now is, a corporation organized and existing under and by virtue of the laws of the State of Massachusetts, and a citizen and inhabitant of said State, having an office and place of business at No. 116 John Street, County, Southern District, and State of New York; and defendant was, and now is, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, and a citizen and inhabitant of that State.

2. The matter in controversy herein, exceeds, exclusive of interest and costs, the sum of $3,000.

3. On or about May 1, 1918, plaintiff issued its valued policy of insurance upon the S. S. "Almirante", wherein and whereby it insured defendant, as owner of the said vessel, against loss by collision and certain other perils [fol. 33] in the amount of $15,815. for one year from said date. In and by said policy it was expressly provided and agreed that said vessel was valued at $632,610. The defendant also procured other policies of similar tenor, the aggregate of which, together with the amount carried by the defendant as self-insurer, amounted to $632,610.

4. On or about September 6, 1918, and while said policy was still in full force and effect, said vessel was in collision with the S. S. "Hisko", and became a total loss by reason of said collision.

5. Thereafter defendant abandoned the "Almirante" to the hull underwriters, including plaintiff, and claimed the sum insured in payment of a total loss.

6. On or about December 16, 1918, plaintiff accepted said abandonment and paid to defendant the sum insured, namely $15,815, being payment in full of defendant's claim for the total loss of said vessel under said policy.

7. Upon information and belief, thereafter defendant brought suit against the owner of the S. S. "Hisko" and recovered $1,761,693.02, being the value of the S. S. "Almirante" and her equipment insured under the said policy mentioned in paragraph 3. Defendants legal and other expenses in respect of said litigation and recovery amounted to $300,024.53, leaving a net recovery of $1,461,668.49, of which defendant has paid to plaintiff $7,907.50 on September 28, 1932, and $6,130.21 on November 28, 1932, in all $14,037.71.

8. The net amount recovered by defendant from the owner of the "Hisko" for the loss of the "Almirante", namely [fol. 34] $1,461,668.49, is more than double the amount at which said vessel was valued by agreement between plaintiff and defendant in the policy of insurance issued by plaintiff to defendant, as set forth in paragraph 3 hereof. If such net recovery of $1,461,668.49 is distributed pro rata

among all the said underwriters, in the proportion their policies bear to the insured value of $632,610., the plaintiff is entitled to receive $36,541.71 as its share of the net recovery, less $14,037.71.

9. If the share of the recovery due to the plaintiff is limited to reimbursement, then the plaintiff is entitled to receive, as its share of the recovery, the amount it paid to defendant, namely, $15,815, with interest thereon as follows: on $15,815 from December 16, 1918 to September 28, 1932; on $7,907.50 from September 28, 1932 to November 28, 1932; and on $1,777.29 from November 28, 1932, less $14,037.71.

Wherefore, plaintiff demands judgment against the defendant for $22,504. with interest and costs, and for such other relief as may be just.

Bigham, Englar, Jones & Houston, Attorneys for Plaintiff, 64 Wall Street, New York, N. Y.

[fol. 35] *Duly sworn to by Martin Detels. Jurat omitted in printing.*

[fol. 36] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER IN BOSTON INSURANCE COMPANY ACTION

The defendant, answering the complaint herein, alleges as follows:

1. It denies that it has any knowledge or information sufficient to form a belief as to the organization of the plaintiff. It admits the other allegations contained in Paragraph 1 of the complaint.

2. It admits the allegations contained in Paragraph 2 of the complaint.

3. It admits the allegations contained in Paragraph 3 of the complaint, but for greater accuracy and completeness refers to the original policy of insurance which is in the custody of the plaintiff.

4. It admits the allegations contained in Paragraph 4 of the complaint.

5. It admits the allegations contained in Paragraph 5 of the complaint. A copy of the notice of abandonment is [fol. 37] attached hereto, marked Schedule "A".

6. It denies that the hull underwriters, including the plaintiff, accepted said abandonment.

It admits the other allegations contained in Paragraph 6 of the complaint.

7. It admits that thereafter it brought suit against the owner of the S. S. "Hisko" and recovered $1,761,693.02, being the actual value of the S. S. "Almirante" and her equipment, partially insured in the said policy mentioned in Paragraph 3 of the complaint. It admits the allegations contained in the second sentence of Paragraph 7 of the complaint.

8. It admits the allegations contained in Paragraph 8 of the complaint.

9. It denies the allegations contained in Paragraph 9 of the complaint.

Further answering, defendant alleges:

10. In addition to the policies of insurance referred to in Paragraph 3 of the complaint, the defendant also, in accordance with the customary practice, procured other policies of insurance upon the S. S. "Almirante" for increased valuation in the sum of £65,105, which additional insurance covered only against total and/or constructive total loss and was permitted by the terms of the hull policies.

11. The S. S. "Hisko", which collided with the S. S. "Almirante", as alleged in Paragraph 4 of the complaint, [fol. 38] was owned by the United States of America.

12. On or about the 28th day of January, 1919, the plaintiff paid to defendant the amount of $15,815, on account of the total loss of said vessel under Policy No. 75285, under and pursuant to the following subrogation agreement:

"$15,815.00.

Subrogation Receipt

"Received of the Boston Insurance Company, Boston, Massachusetts, Fifteen Thousand and Eight Hundred Fifteen Dollars in full payment, release and discharge of all

claims or demands against the said Company, arising from or connected with total loss to Hull S/S "Almirante" Coll'n S. S. "Hisco", which loss or damage arose or occurred on or about the — day of ——, 19—; and in full payment, release and discharge of all claims or demands against the said Company under the certain Policy of Insurance made by said Company and numbered 75285 arising from or connected with any such loss or damage; and for and in consideration of such payment the undersigned hereby assigns and transfers to the said Company all claims and demands against any person, persons, vessels, or property, arising from or connected with such loss or damage, and the said Company is subrogated to all rights of the undersigned with respect to said loss or damage.

"We do hereby sell, assign and transfer to said Boston Insurance Company all our rights and interest in the above, [fol. 39] to the extent of $15,815.00 to have and to hold the same to the said Company its successors and assigns to their own use forever.

"Dated this 28th day of January, 1919, at New York.

United Fruit Company, by (Signed) John W. Damon, Treasurer."

13. Thereafter, the defendant and the various hull underwriters, including the plaintiff herein, jointly retained attorneys to prosecute the claim for damages occasioned by the said loss of the S. S. "Almirante" against the United States of America, as owner of the S. S. "Hisko".

14. The said attorneys, pursuant to their retainer and by instructions from the defendant and the various hull underwriters, including the plaintiff herein, procured the passage of a Special Act of Congress authorizing suit on the part of the owner of the S. S. "Almirante" against the United States of America. No recovery against the United States could have been had without a Special Act of Congress. Said Act of Congress, known as Private Law No. 398, was enacted by the 69th Congress, Second Session, s. 2899, duly approved by the President of the United States of America, on February 26, 1927, and entitled "An Act for the Relief of the Owner of the American Steamship Almirante, etc.". This Act provided that any amount recovered against the United States of America for the loss of the S. S. "Almirante" should be without interest. Without this proviso the Act could not have been obtained.

[fol. 40] Copy of said Act is annexed hereto, marked Schedule "B".

15. Thereafter, said attorneys, pursuant to their retainer by the defendant and the hull underwriters, including the plaintiff, and by their express instructions, filed a suit in the name of the owner of the S. S. "Almirante" in the United States District Court for the Southern District of New York against the United States of America, as owner of the S. S. "Hisko", under the Special Act of Congress referred to above, and recovered the sum of $1,761,693.02 as the actual value of the S. S. "Almirante" and her equipment at the time of her loss. Payment of this judgment was received by the said attorneys on July 26, 1932. In accordance with the provisions of the Act of Congress under which the suit was brought, no interest was allowed on the recovery and no interest was in fact recovered.

16. The necessary legal and other expenses incurred in respect to said litigation, after deduction of taxable costs recovered, amounted to $300,024.53, leaving a net recovery of $1,461,668.49. A portion of said recovery was paid over by said attorneys to Johnson & Higgins, average adjusters, for distribution to the various underwriters; the balance of said net recovery was paid over by said attorneys to the defendant herein. As soon as the proper calculations could be made, Messrs. Johnson & Higgins paid to the plaintiff as its share of said net recovery the amounts as alleged in Paragraph 7 of the complaint.

[fol. 41] 17. The sum of $14,037.71 which was paid to the plaintiff as alleged in Paragraph 7 of the complaint was arrived at as follows: Plaintiff was credited with the amount of its payment to the defendant, pursuant to the terms of its policy of insurance (after deduction of plaintiff's proportion of amount received on sale of lifeboats recovered) in the net amount of $15,802.50; to this sum was added the amount of bank interest earned thereon from the date on which the judgment was paid by the United States until the plaintiff received payment of its share thereof, amounting to $33.32; from this total was subtracted the plaintiff's proportion of legal fees and other expenses amounting to $1,798.11.

18. The premium paid by the defendant to the plaintiff for its policy of insurance on the S. S. "Almirante" was

based upon the proportion of the agreed value of the S. S. "Almirante" amounting to $632,610.00 specifically stated in plaintiff's valued policy, and not upon that proportion of the actual value of said vessel as determined in the suit which resulted in the recovery as aforesaid.

19. Plaintiff has received in full the total amount to which it is entitled under its rights of subrogation.

Wherefore, the defendant demands that the complaint herein be dismissed, with costs, and such other and further relief as may be just.

Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for Defendant, Office & P. O. Address, 27 William Street, Borough of Manhattan, City of New York.

[fol. 42] *Duly sworn to by Arthur E. Nicholson. Jurat omitted in printing.*

SCHEDULE A, ANNEXED TO ANSWER IN BOSTON INSURANCE COMPANY ACTION

(This schedule is identical in substance with Schedule A, Annexed to Answer in Ætna Insurance Company Action printed herein at page 17.)

SCHEDULE B, ANNEXED TO ANSWER IN BOSTON INSURANCE COMPANY ACTION

(This schedule is identical with Schedule B, Annexed to Answer in Ætna Insurance Company Action printed herein at page 18.)

[fol. 43] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

L-57-271

ÆTNA INSURANCE COMPANY, Plaintiff,

against

UNITED FRUIT COMPANY, Defendant

L-57-272

UNION MARINE & GENERAL INSURANCE COMPANY, Plaintiff,

against

UNITED FRUIT COMPANY, Defendant

L-57-273

BOSTON INSURANCE COMPANY, Plaintiff,

against

UNITED FRUIT COMPANY, Defendant

New York, October 30, 1936;
10 A. M.

Before Hon. Robert P. Patterson, District Judge

APPEARANCES

Bigham, Englar, Jones & Houston, Esqrs., Attorneys for Plaintiffs; D. Roger Englar, Esq., and Martin Detels, Esq., of Counsel.

Kirlin, Campbell, Hickox, Keating & McGrann, Esqs., Attorneys for Defendant; Cletus Keating, Esq., and Richard L. Sullivan, Esq., of Counsel.

[fol. 44] COLLOQUY

Mr. Englar: Your Honor, these three cases are very similar, in fact almost identical, and counsel would prefer to try them together.

The Court: Is that agreeable?

Mr. Keating: Yes.

The Court: Very well, you may enter an order consolidating them.

Mr. Englar: It is understood that all the evidence introduced in one case will apply to the other case except on matters of materiality and relevancy.

Mr. Keating: That is all right.

The Court: These are actions at law, are they not?

Mr. Englar: Yes, but we have agreed to try them before your Honor and a jury of one.

The Court: Is there a stipulation to that effect?

Mr. Englar: I will put it on the record, your Honor.

The Court: Very well.

Mr. Englar: It is hereby stipulated by and between the attorneys for the respective parties hereto, that this case may be tried by the Court before a jury of one; that each side shall make a motion at the close of the case for a directed verdict in its favor; and that the Court shall direct a verdict with the same force and effect as if a jury of twelve were then present.

Mr. Keating: That is agreed to.

The Court: Do you want me to read the pleadings?

Mr. Englar: I don't think it is necessary. I can state quite briefly what the issues are.

The Court: Swear a juror.

(A juror was sworn.)

(Mr. Englar then opened to the jury on behalf of the plaintiffs.)

(Mr. Keating opened to the jury on behalf of the defendant.)

[fol. 45] Mr. Englar: Most of the facts, in fact all of the facts, were stipulated and my friend has agreed that the various stipulations may be jointly offered, either side reserving their objections to relevancy and materiality. That will save going through the stipulations.

OFFERS IN EVIDENCE

Mr. Detels: I offer in evidence on behalf of both plaintiff and defendant the stipulation of facts in the case of Ætna Insurance Company against United Fruit Company, dated May 28, 1936.

(Marked Plaintiffs' Exhibit 1.)

Mr. Detels: I offer in evidence stipulation in the Boston Insurance Company case dated September 23, 1936, as Exhibit 2.

(Marked Plaintiffs' Exhibit 2.)

Mr. Detels: I offer in evidence supplemental stipulation in the Boston Insurance Company case.

Mr. Keating: That stipulation is apparently undated.

Mr. Englar: It is undated, yes.

(Marked Plaintiffs' Exhibit 3.)

Mr. Detels: I offer in evidence stipulation in the Union Marine case dated June 10, 1936.

(Marked Plaintiffs' Exhibit 4.)

Mr. Detels: Supplemental stipulation in the Union Marine case, undated.

(Marked Plaintiffs' Exhibit 5.)

Mr. Englar: I offer in evidence on behalf of plaintiffs the original Ætna Insurance Company policy No. 6315.

(Marked Plaintiffs' Exhibit 6.)

Mr. Englar: The original Boston policy No. 75,285.

(Marked Plaintiffs' Exhibit 7.)

[fol. 46] Mr. Englar: The original Union Marine policy No. 351.

(Marked Plaintiffs' Exhibit 8.)

Mr. Englar: Counsel jointly offer the recovery statement prepared by Messrs. Johnson & Higgins under date of November 22, 1932, with the same reservation as to relevancy and materiality as in the case of the stipulations.

The Court: What is that?

Mr. Englar: That is the recovery statement—the apportionment of the recovery prepared by the brokers for the owners.

(Marked Plaintiffs' Exhibit 9.)

Mr. Englar: If the Court please, I wish to prove one point of English law and counsel for the defendant has consented that instead of calling an expert, I may introduce the

relevant section of the Marine Insurance Act and one decision construing it.

The Court: How does the British law become relevant?

Mr. Englar: I think you will find it relevant on the P. P. I. policies which are paid in England, and to whom part of the recovery was paid. I therefore offer in evidence Section 4 of the Marine Insurance Act of 1906, and I understand that it is conceded that the act has remained continuously in force since it was passed.

Mr. Keating: I object merely as to the relevancy of English law to this proceeding, sir.

The Court: I will take it.

Mr. Keating: Exception.

(Marked Plaintiffs' Exhibit 10.)

Mr. Englar: I offer in evidence one English decision, subject to the same objection, of course.

[fol. 47] The Court: You don't have to offer that in evidence, do you?

Mr. Englar: I think perhaps for this purpose it should be in evidence, but I do not think it need be physically marked.

The Court: Why need it be in evidence?

Mr. Englar: Of course, your Honor may consult it as an authority, but I think, strictly as English law, I ought perhaps offer it in evidence.

The Court: All right.

Mr. Englar: The case is the case of John Edwards & Company v. Motor Union Insurance Company, Ltd., reported in 1922, 2 Kings Bench 249; 16 Aspinwall Maritime cases 89; 128 Law Times 276. I understand your Honor can consult the case without my physically putting in my copy.

The Court: Very well.

Mr. Englar: I would like to call one witness, your Honor, merely to explain the recovery statement. It involves a lot of figures and calculations and I would like to put on a witness.

ALEXANDER B. GRANT, called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Englar:

Q. Mr. Grant, what is your present position?

A. I am the assistant United States manager of the Thames & Mersey Marine Insurance Company.

Q. Will you tell us briefly what experience you have had in marine insurance?

A. I was employed by the Thames & Mersey Marine In- [fol. 48] surance Company in Liverpool in 1898 and I served an apprenticeship there for five years. Later I spent several years in the underwriting and claims departments. Towards the end of 1919 I took over the management of the claims department in the New York branch. At the close of 1929 I was appointed assistant United States manager of the Thames & Mersey Marine Insurance Company.

Q. The Thames & Mersey, as I understand, is one of the companies that have an interest in the result of this litigation?

A. That is so.

Q. But is not one of the plaintiffs in these suits?

A. No.

The Court: Did they have a portion of the hull insurance?

Mr. Englar: Yes. I simply want it to appear that the witness is in a sense an interested witness.

The Court: I see.

Q. You are acquainted, Mr. Grant, with the various forms of statements, which are prepared and used in marine insurance, such as particular average statements, general average statements, and recovery statements, are you not?

A. That is so, sir.

Q. Have you at my request made an examination of this recovery statement, Exhibit 9?

A. I have, sir.

Q. Have you examined the policies, that is the American form of hull policy and the form of the British P. P. I. policies?

A. I have, sir.

Q. I informed you, did I not, that it had been stipulated that the payments made by the British underwriters had been made at the rate of $4.75¾?

A. That is right.

[fol. 49] Q. And you made your calculations on that basis?

A. Yes.

The Court: The basis made in 1918.

Mr. Englar: Yes, sir.

Q. Now, will you give us, Mr. Grant, in totals the amount of the American hull insurance, the amount of the English hull insurance and the amount of English P. P. I. insurance, and in dealing with the English insurance, will you give it to us in pounds and also in dollars?

A. The total insurances in force in 1918 are as follows:

American insurance on hull on an agreed valuation of $632,610 amounted to $335,282. This included a line of $50,609 retained by the United Fruit Company.

Q. Just a moment. The United Fruit Company was an insurer then to the extent of 50609/632,610ths of the total amount?

A. They had an 8 per cent interest.

Q. Proceed.

A. There were English insurances on hull totaling in pounds 61,305;

English insurances on P. P. I. policies totaling 65,105, or a total in pounds of 126,410 which converted at the exchange rate of $4.75¾ produced in dollars $600,395.57, making a grand total of the insurances in force of $936,677.57.

Q. That included, however, the line of 50,609/632,610ths carried by the Fruit Company?

A. That is so, sir.

Q. What was the award for the vessel including stores and sundries?

A. $1,763,013.38.

By the Court:

Q. Have you made a tabulation from the recovery statement?

A. Yes, sir.

[fol. 50] Mr. Englar: He has put in two pages here practically, and that is important in the recovery statement.

The Court: I understand it is a summary by the witness of the recovery statement.

Mr. Englar: Yes, sir.

The Witness: Do you wish me to carry on, sir?

Mr. Englar: Just a moment, please. Mr. Keating is checking the statement and suggests perhaps we might put it in.

The Court: Why not?

Mr. Englar: If he is satisfied it is correct, that is the simplest way of doing it.

The Court: Yes, it is a convenient summary.

Mr. Englar: There is a third page which will show that the hull underwriters also carried P. P. I., page 1.

Mr. Keating: I have no objection to its going in, sir. These figures are taken from the average statement that I agreed to.

The Court: You do not need a concession from the defendant on this, of course. If the witness testified that he took these summaries from the recovery statements and he is qualified, it can go in as a convenient summation of his testimony.

Mr. Keating: I do not object to the figures, but in the lower part of this thing the witness attempts to draw some conclusions. I would like to have him testify to that.

Mr. Englar: The figures on the first page perhaps do not mean so much without the next page. It runs over the next page.

Mr. Keating: Down to the end where the figures are?

[fol. 51] Mr. Englar: Down to the middle of page 2.

Mr. Keating: Suppose you just tear that off.

Mr. Englar: All right.

Mr. Keating: You can put in page 3 too if you like.

Mr. Englar: Very well, I will make that a separate exhibit.

I offer in evidence on behalf of the plaintiffs, a page and a half of calculations, being a summary taken by the witness from the recovery statement.

(Marked Plaintiffs' Exhibit 12.)

Mr. Englar: I also offer in evidence a tabulation showing a comparison of the hull and P. P. I. insurance placed in

England, that is, showing which of the hull underwriters were also underwriters of the P. P. I. policies.

(Marked Plaintiffs' Exhibit 13.)

Q. Now, Mr. Grant, in addition to extracting these figures from the statement, did you also determine just what the final position of the English hull underwriters was after the distribution of the proceeds made by the defendant, as compared with the position of the American hull underwriters?

A. I did, sir.

Q. Will you state how the distribution affected them relatively?

Mr. Keating: Just a moment. If this question is directed to asking how the English hull underwriters compared with the American hull underwriters, that is all right; but if [fol. 52] my friend wants to interject the fact that some of these underwriters also had P. P. I. policies I object to the relevancy, competency and materiality of such evidence.

The Court: Overruled.

Mr. Keating: Exception.

By Mr. Englar:

Q. Will you answer the question, please?

A. The American hull underwriters received approximately 90 per cent of the original payments which they had made. There was no P. P. I. insurance placed in this market. It was all placed in London, as the underwriters in England who wrote about 90 per cent of the total insurances placed on hull also wrote about two-thirds of the total insurances placed on disbursements, and as those underwriters although only receiving the sum or net proceeds as the American underwriters on the hull policies, that is approximately 90 per cent, those same underwriters received 50 per cent of the face value of their P. P. I. policies less a deduction for expenses, and the result was that those particular underwriters who had policies both on full insurance and P. P. I. received approximately the equivalent of 120 per cent of the amounts they had originally paid under their hull policies.

Mr. Englar: That is all.

Cross-examination.

By Mr. Keating:

Q. Mr. Grant, do you mean to suggest in any way that the English hull underwriters, as such, were treated in any different way from the American hull underwriters on the same policies?

A. No, I do not.

[fol. 53] Q. All hull underwriters were treated precisely the same?

A. Exactly the same.

Q. So what you are complaining about——.

Mr. Englar: The witness is not complaining, Mr. Keating, he is simply stating facts.

Mr. Keating: I didn't know. He had a rather nasty tone.

Q. Are you suggesting that the United Fruit Company acted unconscionably in paying back to the P. P. I. underwriters a portion of the recovery from the government?

Mr. Englar: I object. The witness has not passed on the moral aspect of this case. I do not think he was asked how he viewed the ethical aspects of the recovery.

The Court: Overruled.

A. It was a long question that you asked me. You wanted my opinion as to why the ship owners should make any payments to the P. P. I. underwriters?

Q. Don't you think it was a decent thing to do?

A. It was a very recent thing to do, but of course they did it on their own responsibility entirely.

Q. You are aware, aren't you, that the P. P. I. underwriters asked under the circumstances the Fruit Company to make some voluntary payment?

A. Exactly, sir.

Q. And the Fruit Company fell in with that suggestion?

A. Yes.

Q. And I take it that you do not think the Fruit Company acted unconscionably?

A. I think they acted generously, sir.

Q. We always thought so too. You were the American underwriters in those policies, weren't you?

A. Yes, sir.

[fol. 54] Q. You were also the British underwriter on those policies on hull?

A. Yes.

Q. But you were not a P. P. I. underwriter?

A. That is so.

Q. Did you accept a final settlement for your company or did your company accept a final settlement in England on the hull policies?

A. Yes, sir.

Q. So you took it in England but you are going to sue on it here; is that your position?

Mr. Englar: The position of course is not——

Mr. Keating: Don't help him out; he doesn't need it.

A. I can only state here—I am not sure whether you are asking me as a witness or as one of the interested underwriters.

Q. I am asking you the question as a witness under oath in this Court?

A. As a witness and also as an underwriter here, I can only speak for the United States branch of our company and say that we have joined with other American companies here in this action.

Q. And you also joined with the British underwriters in not making such claim?

A. Well, our head office did that.

Q. Doesn't your head office control the company here or do you control it?

A. As regards the attitude in this suit, we are getting a good deal of latitude, and we joined with our American underwriters.

Q. So it does not make any difference whether you have one position in England and another position here on precisely the same kind of policy, in your opinion?

A. Really, in fairness, I think you must admit in the American market the company very largely has to do very [fol. 55] largely the same as the other underwriters do, whereas if in the English market most of the underwriters were willing to accept a settlement, having in mind the fact that they were getting some P. P. I. dividends——

Q. You would not get in there?

A. We would not get in.

Q. Then you were not in the same position as the other underwriters?

A. We were not in the same position as the underwriters. After all, we had it from the same broker and very often an underwriter joins in suits although it is against his own interest to do so, it is done——

The Court: This gentleman has suggested that the English underwriters were influenced in accepting the settlement that Johnson & Higgins set out in their recovery statement by the fact that there was some P. P. I. insurance; that is this witness' testimony. His testimony on direct was a cut and dried affair. I suppose they could have put on a professor of mathematics to get for him the calculations on the recovery statement.

Mr. Keating: If he stuck to figures, but he went on to testify that all the English hull underwriters received 120 as compared with the 90 here.

The Witness: No, sir.

The Court: He said the majority and he happened to have two kinds of insurance and regarded that as an advantage.

Mr. Keating: That is as far as I wish to go on that except to ask the witness one question.

Q. You were aware, Mr. Grant, were you not, that the American underwriters asked the English underwriters to [fol. 56] participate in this suit and they declined?

A. May I point out, I understand after that lawyer's decision they had already been in touch with the owners or the owner's representatives and already made their bargain.

Redirect examination.

By Mr. Englar:

Mr. Englar: I think most of my friend's cross examination was a little beside the point which makes it necessary for me to pursue it a step further.

Q. It is a fact, is it not, Mr. Grant, that a number of the English companies are very closely affiliated by stock ownership?

Mr. Keating: I object.

The Court: Overruled.

Q. (Continued.) Is that true, Mr. Grant?
A. Yes.

Mr. Keating: If he knows.

Q. You know about your own company, don't you?
A. Yes.
Q. Is it a fact that the Thames & Mersey and the British and Foreign, for example, are pretty closely related by stock ownership?
A. Yes.

Mr. Englar: That is all.
The plaintiffs rest, your Honor.
Mr. Keating: The defendant rests.

MOTIONS FOR DIRECTED VERDICT

Mr. Englar: The plaintiffs move the Court for the direction of a verdict in their favor.
Mr. Keating: I move that the Court direct a verdict in favor of the defendant, dismissing the complaint with costs.

(Argument by counsel.)

The Court: I will reserve decision.

[fol. 57] IN UNITED STATES DISTRICT COURT

L 57-271, L 57-272, L 57-273

[Title omitted]

Order Amending Stenographer's Minutes Nunc Pro Tunc

Upon the annexed stipulation it is hereby
Ordered that the stenographer's minutes of the trial be amended nunc pro tunc by adding thereto the following:

DIRECTION OF VERDICT

December 11, 1936.

The Court: Verdict is directed in favor of the plaintiff Ætna Insurance Company for $2,132.76, in favor of Boston

Insurance Company for $1,777.29, and in favor of Union Marine and General Insurance Company for $710.92, each figure to carry interest from November 28, 1932.

Mr. Englar: Exception.

Mr. Keating: Exception.

MOTIONS TO SET ASIDE VERDICTS

Mr. Englar: I move to set aside the verdicts directed in favor of the plaintiffs Ætna Insurance Company, Boston Insurance Company, and Union Marine & General Insurance Company, respectively, against the defendant United Fruit Company, on the ground that the same are contrary [fol. 58] to law and contrary to the evidence.

The Court: Motion denied.

Mr. Englar: Exception.

Mr. Keating: I move to set aside the verdicts directed in favor of the plaintiffs Ætna Insurance Company, Boston Insurance Company and Union Marine & General Insurance Company, respectively, against the defendant United Fruit Company, on the ground that they are contrary to law and contrary to the evidence.

The Court: Motion denied.

Mr. Keating: Exception.

Dated, New York, March 3rd, 1937.

Robert P. Patterson, U. S. D. J.

It is hereby stipulated that the foregoing order be entered without prejudice to the rights of both parties to appeal from the judgments and orders of the trial court herein.

Dated, New York, March 2, 1937.

Bigham, Englar, Jones & Houston, Attorneys for Plaintiffs. Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for Defendant.

[fol. 59] PLAINTIFFS' EXHIBIT 1

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

L 57-271

ÆTNA INSURANCE COMPANY, Plaintiff,

against

UNITED FRUIT COMPANY, Defendant

The following facts are hereby stipulated for the purpose of trial, subject to any objection which may be made to the admission into evidence of any of said facts upon the trial on any ground other than the ground that the facts are not sufficiently proved:

1. That at all the times mentioned in the complaint, plaintiff was, and now is, a corporation organized and existing under and by virtue of the laws of the State of Connecticut, and a citizen and inhabitant of said State, having an office and place of business at No. 89 Maiden Lane, County, Southern District, and State of New York.

2. That plaintiff's policy No. 6315 in the possession of defendant, is the policy referred to in paragraph "3" of the complaint, and may be admitted in evidence.

3. That the defendant procured other policies of insurance on the S. S. "Almirante" in the amount of £65,105, [fol. 60] upon the terms and conditions set forth in Exhibits "1", "2", "3" and "4" annexed hereto.

4. That the letter dated October 25, 1918, from Johnson & Higgins to plaintiff, copy of which is attached to the answer as Schedule "A", was received by the plaintiff; that on or about October 28, 1918, plaintiff wrote to Johnson & Higgins the letter, copy of which is attached hereto marked Exhibit "5"; that no efforts were ever made to salve the "Almirante"; and on or about December 5, 1918, plaintiff paid to defendant a total loss under its policy No. 6315.

5. That the defendant also collected £65,105 from the underwriters who issued the policies referred to in paragraph "3" hereof.

6. That the S. S. "Hisko", which collided with the S. S. "Almirante", was owned by the United States of America.

7. That the plaintiff and defendant and the other hull underwriters who had issued policies similar to plaintiff's policy No. 6315, jointly retained Kirlin, Woolsey & Hickox and its successor firms Kirlin, Woolsey, Campbell, Hickox & Keating, and Kirlin, Campbell, Hickox, Keating & McGrann, to prosecute the claim for damages occasioned by the loss of the S. S. "Almirante" against the United States of America.

8. That said attorneys, pursuant to their retainer and pursuant to instructions from the defendant and plaintiff and other hull underwriters, procured the passage of a Special Act authorizing suit against the United States of America.

[fol. 61] 9. That the copy of said Special Act attached to the answer as Schedule "B" is a correct copy of said Act; and that no further proof of said Act shall be necessary.

10. That thereafter said attorneys, pursuant to their retainer by the defendant and plaintiff and other hull underwriters, and by their express instructions, filed suit in the name of the owner of the S. S. "Almirante" in the United States District Court for the Southern District of New York against the United States as owner of the S. S. "Hisko", under the Special Act of Congress above referred to, and recovered the sum of $1,761,693.02 as the actual value of the S. S. "Almirante" and her equipment at the time of her loss.

11. The payment of this judgment was received by said attorneys on July 26, 1932.

12. That, in accordance with the provisions of the Act of Congress under which the suit was brought, no interest was allowed on the recovery; and no interest was, in fact, recovered.

13. That the reasonable and necessary legal and other expenses in respect of said litigation, after deduction of taxable costs recovered, amounted to $300,024.33.

14. That on September 27, 1932 and November 25, 1932, a portion of said recovery was paid over by said attorneys to Messrs. Johnson & Higgins for distribution to the various underwriters, including the plaintiff; and the balance of

said net recovery was paid over by said attorneys to the defendant herein.

[fol. 62] 15. Thereafter Johnson & Higgins, out of the funds in their hands, paid to the plaintiff the amounts alleged in paragraph "Seventh" of the complaint.

16. That the sum of $16,845.24, which was paid to the plaintiff as alleged in paragraph "Seventh" of the complaint, was arrived at as follows:

Plaintiff was credited with the amount of its payment to the defendant	$18,978.00
Less plaintiff's proportion, 18978/632610ths, of $500.00 received on the sale of lifeboats recovered	15.00
	$18,963.00
Add bank interest earned on $18963.00 from July 26, 1932, the date on which the judgment was paid by the United States, until the plaintiff received the payments alleged in paragraphs "Seventh" of the complaint	39.99
	$19,002.99
Deducted by defendant on account of legal fees and other expenses set forth in the recovery statement hereinafter referred to	2,157.75
Paid to plaintiff	$16,845.24

17. The recovery statement issued by Johnson & Higgins under date of November 22, 1932, or any part thereof, may [fol. 63] be offered in evidence by either party as prima facie evidence of any of the facts stated therein,—it being understood, however, that this stipulation is not to be construed as an admission by the plaintiff that the division and apportionment of the recovery as shown therein is proper.

18. As evidence of the course of the proceedings which led to the recovery here involved, either party may refer to any of the court decisions which were rendered in those proceedings.

Dated, New York, May 28, 1936.

Bigham, Englar, Jones & Houston, Attorneys for Plaintiff. Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for Defendant.

✓ Exhibit 1, Annexed to Plaintiffs' Exhibit 1.

S.G.

£ 27240

(No.55069)

Insured with:—

£ 6915 Brit.& For.Co
£ 2765 Marine Co.
£ 3460 Brit.Dom& Co
£ 1385 London & Prov.Co.
£ 1385 World Co.
£ 925 Economic Co.
£ 1385 Alliance Co.
£ 460 Century Co.
£ 1840 Employers Liab.
£ 8720 Lloyds U/rs.

The Underwriters on this policy hereby consent to give Willis, Faber & Co. Ltd. an immediate right of set-off in the event of claim

Be it known that WILLIS, FABER & CO, LTD, For account of whom it may concern

as well in their own Name, as for and in the Name and Names of all and every other Person or Persons to whom the same doth, may, or shall appertain, in part or in all, doth make assurance, and cause themselves and them, and every of them, to be insured, lost or not lost, at and from

Say for and during the space of twelve calendar months commencing at Noon 31st December 1917, and ending at Noon 31st December 1918

beginning and ending with Greenwich Mean Time.

upon any kind of Goods and Merchandises, and also upon the Body, Tackle, Apparel, Ordnance, Munition, Artillery, Boat and other Furniture, of and in the good Ship or Vessel, called the

Almirante

wherof is Master, under God, for this present Voyage,

or whosoever else shall go for Master in the said Ship, or by whatsoever other Name or Names the same Ship, or the Master thereof, is or shall be named or called; beginning the Adventure upon the said Goods and Merchandises from the loading thereof aboard the said Ship as above

upon the said Ship, &c.,

and shall so continue and endure, during her Abode there, upon the said Ship, &c.; and further; until the said Ship, with all her Ordnance, Tackle, Apparel, &c., and Goods and Merchandises whatsoever, shall be arrived at as above

upon the said Ship, &c., until she hath moored at Anchor Twenty-four Hours in good safety, and upon the Goods and Merchandises, until the same be there discharged and safely landed; and it shall be lawful for the said Ship, &c., in this Voyage, to proceed and sail to, and touch and stay at any Ports or Places whatsoever

without prejudice to this Insurance. The said Ship, &c., Goods and Merchandises, &c., for so much as concerns the Assured, by Agreement between the Assured and the Assurers in this Policy, are and shall be valued at, say on

INCREASED VALUE OF HULL AND MACHINERY, &c.

Touching the Adventures and Perils which we the Assurers are contented to bear and do take upon us in this Voyage, they are of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Counter-Mart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes, and People, of what Nation, Condition, or Quality soever, Barratry of the Master and Mariners, and of all other Perils, Losses, and Misfortunes that have or shall come to the Hurt, Detriment, or Damage of the said Goods and Merchandises, and Ship, &c., or any Part thereof; and in case of any Loss or Misfortune, it shall be lawful to the Assured, their Factors, Servants, and Assigns, to sue, labour, and travel for, in and about the Defence, Safeguard and Recovery of the said Goods and Merchandises, and Ship, &c., or any Part thereof, without Prejudice to this Insurance; [illegible] And it is expressly declared and agreed that no acts of the Insurer or Insured in recovering, saving, or preserving the property Insured, shall be considered as a waiver or acceptance of abandonment. And it is agreed by us, the Insurers, that this Writing or Policy of Assurance shall be of as much force and effect as the surest Writing or Policy of Assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London. And so we the Assurers are contented, and do hereby promise and bind ourselves, each one for his own Part, our Heirs, Executors, and Goods, to the Assured, their Executors, Administrators, and Assigns, for the true Performance of the Premises, confessing ourselves paid the Consideration due unto us for this Assurance by the Assured at and after the Rate of Twenty five shillings per cent.

In WITNESS whereof, we the Assurers have subscribed our Names and Sums assured in

London, 9th January 191 8

Warranted free of capture, seizure, arrest, restraint, or detainment, and the consequences thereof or of any attempt thereat (piracy excepted), and also from all consequences of hostilities or warlike operations whether before or after declaration of war.

CANCELLED

N.B.—Corn, Fish, Salt, Fruit, Flour and Seed are Warranted free from Average, unless general, or the Ship be stranded; Sugar, Tobacco, Hemp, Flax, Hides, and Skins are Warranted free from Average under Five Pounds per Cent.

Exhibit 1, Annexed to Plaintiffs' Exhibit 1.

No. 188. Form B.

W. F. & Co., LTD.
TIME. (DISBURSEMENTS Incl. Exc. Hab.)

Attaching to policy for £ 29240
per Almaeda *£ and forming part thereof.*

1. As employment may offer, in Port and at Sea, in Docks and Graving Docks, and on Ways, Gridirons, and Pontoons, at all times, in all places, and on all occasions, services, and trades whatsoever, and wheresoever, under steam or sail; with leave to sail with or without Pilots, TO TOW AND BE TOWED, and to assist Vessels and/or Craft in all situations and to any extent, and to go on trial trips. Including all risk incidental to Steam and Steam Navigation. With liberty to discharge, exchange, and take on board, Goods, Specie, Passengers and Stores, wherever the Vessel may call at or proceed to without being deemed a deviation, and with liberty to carry Goods, Live Cattle, &c., on deck or otherwise. Including all risks of docking, undocking, changing docks, or moving in harbour and going on or off gridiron or graving dock as often as may be done during the currency of this policy.

2. And it is expressly declared and agreed that no acts of the Insurer or Insured, in recovering, saving, or preserving the property insured shall be considered as a WAIVER or acceptance of abandonment.

3. This insurance is against the risk of total loss and/or constructive total loss of vessel, and is also to cover its proportion as below of all claims under the four-fourths running down clause (including costs) not collectible under policies on hull and machinery, etc., by reason of the difference between the valuation expressed in those policies (or any incidental reduced valuations arising from the deduction therefrom, in process of adjustment, of any particular average or other claim involved) and the value for purposes of collision liability. The proportion of such claims payable by this policy shall be such proportion as the sum hereby insured bears either to the difference between the vessel's valuation as expressed in the policies on Hull and Machinery (or as above) and her valuation for purposes of collision liability—or to the total sum insured against excess liabilities if it exceeds such difference. To follow Hull Underwriters in the event of total or constructive or compromised total loss.

4. This insurance also specially to cover total loss or constructive total loss of Hull and Machinery through negligence of Master, Mariners, Engineers, or Pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the Machinery or Hull, or from explosions, riots, or other causes of whatsoever nature, arising either on shore or otherwise, howsoever, causing loss of the property hereby insured, provided such loss has not resulted from want of due diligence by the owners of the ship or any of them, or by the Manager.

5. In ascertaining whether the Vessel is a constructive total loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account.

6. Warranted free of capture, seizure, arrest, restraint, or detainment, and the consequences thereof or of any attempt thereat (piracy excepted), and also from all consequences of hostilities or warlike operations whether before or after declaration of war.

7. In the event of any breach of warranty or DEVIATION from the conditions of this policy, it is agreed to hold the assured covered; the premium to be arranged.

8. Should the vessel at the expiration of this policy be at sea, or in distress, or at a port of refuge, or of call, she shall, provided previous notice be given to the Underwriters, be held covered at a pro rata monthly premium, to her port of destination.

9. To RETURN 7d. net per cent. for every 15 days the Vessel may be in Port or in Dock, during such period the Vessel being at the risk of the Underwriters; and having leave to dock, undock, and change docks, &c.; and 10d. net per cent. for every 15 days of unexpired time, if this insurance be cancelled, and arrival. A period in port falling between two Insurances to be allowed for pro rata on each, Underwriters on each Insurance agreeing to pay their pro rata proportion of the Return due.

10. The above clauses and conditions are additional to those contained in the Annexed Policy, and so far as they are inconsistent therewith are to supersede the same.

.....

This slip is no part of the policy, and is not to be attached thereto, but is to be considered as binding in honour on the underwriters; the assured however having permission to remove it from this policy should they so desire.

11. Full interest admitted; the policy being deemed sufficient proof of interest.

12. This insurance is without benefit of Salvage.

6/23/15.
6/1924.
10/6/27.

This insurance is against total loss and/or constructive total loss of vessel, and/or excess liability under the 4/4ths Collision Clause in Hull policies, as per clause 3 in form attached.

Including the conditions of the printed clauses attached.

No Salvage Charges and no claim under the sue and labour clause to attach hereto.

This policy is subject to the same warranties as are contained in the Hull Policies and one half of the additional premium payable thereon shall be payable on this Insurance.

65

44

44

at and after the Rate of Twenty five shillings per cent.

In WITNESS whereof, we the Assurers have subscribed our Names and Sums assured in

London, 9th January 191 8

Warranted free of capture, seizure, arrest, restraint, or detainment, and the consequences thereof or of any attempt thereat (piracy excepted), and also from all consequences of hostilities or warlike operations whether before or after declaration of war.

N.B.—Corn, Fish, Salt, Fruit, Flour and Seed are Warranted free from Average, unless general, or the Ship be stranded; Sugar, Tobacco, Hemp, Flax, Hides, and Skins are Warranted free from Average under Five Pounds per Cent.; and all other Goods, also the Ship and Freight, are Warranted free from Average under Three Pounds per Cent., unless general, or the Ship be stranded.

CANCELLED

This is to certify that we have duly stamped and signed Policies of Insurances in accordance with this pro-forma, as fulfilled in manuscript hereof.

WILLIS, FABER & CO. LTD

Exhibit 1

64

Exhibit 2, Annexed to Plaintiffs' Exhibit 1.

S. G

£ 27.740

(Nos 36,158. 52,230.)

Be it known that WILLIS, FABER & CO., Ltd.,
For account of whom it may concern.

as well in their own Name, as for and in the Name and Names of all and every other Person or Persons to whom the same doth, may, or shall appertain, in part or in all, doth make Assurance, and assure themselves and them, and every of them, to be insured, lost or not lost, at and from

Say for and during the space of Twelve Calendar Months commencing at Noon on the 1st day of May, 1918 and ending at Noon on the 1st day of May, 1919 beginning and ending with Greenwich Mean Time.

Insured with:—

£ 3975 Sea Co.
£ 415 Cornhill Co.
£ 1635 Ry. Exch. Assce.
£ 1220 Motor Un. Co.
£ 1220 United Brit. Co.
£ 610 Brit. Commwlth. Co.
£ 1635 Indemnity Co.
£ 1220 Northern Co.
£ 1910 Lloyd's U/rs.

The Underwriters on this policy hereby consent to give Willis Faber & Co., Ltd., an immediate right of set off in the event of claim.

3110 Coml. Union Co. 30/- %

15 day rets. on Lay up. Cancg.

25/-%	7d	10d
30/-%	10d	1/-

5296

upon any kind of Goods and Merchandises, and also upon the Body, Tackle, Apparel, Ordnance, Munitions, Artillery, Boat and other Furniture, of and in the good Ship or Vessel, called the "Almirante P."

@ 25/- %.

whereof is Master, under God, for this present Voyage,

or whosoever else shall go for Master in the said Ship, or by whatsoever other Name or Names the same Ship, or the Master thereof, is or shall be named or called; beginning the Adventure upon the said Goods and Merchandises from the loading thereof aboard the said Ship as above

upon the said Ship, &c.,

and shall so continue and endure, during her Abode there, upon the said Ship, &c.; and further, until the said Ship, with all her Ordnance, Tackle, Apparel, &c., and Goods and Merchandises whatsoever, shall be arrived at as above

upon the said Ship, &c., until she hath moored at Anchor Twenty-four Hours in good safety, and upon the Goods and Merchandises, until the same be there discharged and safely landed; and it shall be lawful for the said Ship, &c., in this Voyage, to proceed and sail to, and touch and stay at any Ports or Places whatsoever

without prejudice to this Insurance. The said Ship, &c., Goods and Merchandises, &c., for so much as concerns the Assured, by Agreement between the Assured and the Assurers in this Policy, are and shall be valued at, say as

DISBURSEMENTS AND EXCESS LIABILITIES) Valued at total sum insured.

Touching the Adventures and Perils which we the Assurers are contented to bear and do take upon us in this Voyage, they are of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Countermart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes, and Peoples, of what Nation, Condition, or Quality soever, Barratry of the Master and Mariners, and of all other Perils, Losses, and Misfortunes that have or shall come to the Hurt, Detriment, or Damage of the said Goods and Merchandises, and Ship, &c., or any Part thereof; and in case of any Loss or Misfortune, it shall be lawful to the Assured, their Factors, Servants, and Assigns, to sue, labour, and travel for, in and about the Defence, Safeguard and Recovery of the said Goods and Merchandises, and Ship, &c., or any Part thereof, without Prejudice to this Insurance; to the Charges whereof we, the Assurers, will contribute, each one according to the Rate and Quantity of his Sum herein Assured. And it is expressly declared and agreed that no acts of the Insurer or Insured in recovering, saving, or preserving the property insured, shall be considered as a waiver or acceptance of abandonment. And it is hereby agreed by us, the Assurers, that this Writing or Policy of Assurance shall be of as much force and effect as the surest Writing or Policy of Assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London. And so we the Assurers are contented, and do hereby promise and bind ourselves, each one for his own Part, our Heirs, Executors, and Goods, to the Assured, their Executors, Administrators, and Assigns, for the true Performance of the Premises, confessing ourselves paid the Consideration due unto us for this Assurance by the Assured at and after the Rate of as per margin per cent.

In WITNESS whereof, we the Assurers have subscribed our Names and Sums Insured in London, 29th June 1918

Warranted free of capture, seizure, arrest, restraint, or detainment, and the consequences thereof or of any attempt thereat (other than by a hostile mine), and also from all consequences of hostilities or warlike operations whether before or after declaration of war.

N.B.—Corn, Fish, Salt, Fruit, Flour and Seed are Warranted free from Average, unless general or the Ship be stranded; Sugar, Tobacco, Hemp, Flax, Hides, and Skins are Warranted free from Average under Five Pounds per

45

Exhibit 2, Annexed to Plaintiffs' Exhibit 1.

No. 105. Form B.

W. P. & Co., Ltd.
Vessel, (Steamer name Mast. Mar. Sail.)

Attaching to policy for £ _____ _____

per _____ *and forming part thereof.*

1. As employment may offer, in Port and at Sea, in Docks and Graving Docks, and on Ways, Gridirons, and Pontoons, at all times, in all places, and on all occasions, services, and trades whatsoever, and wheresoever, under steam or sail; with leave to sail with or without Pilots, TO TOW AND BE TOWED, and to assist Vessels and/or Craft in all situations and to any extent, and to go on trial trips. Including all risk incidental to Steam and Steam Navigation. With liberty to discharge, exchange, and take on board, Goods, Specie, Passengers and Stores, wherever the Vessel may call at or proceed to without being deemed a deviation, and with liberty to carry Goods, Live Cattle, &c., on deck or otherwise. Including all risks of docking, undocking, changing docks, or moving in harbour and going on or off gridiron or graving dock as often as may be done during the currency of this policy.

2. And it is expressly declared and agreed that no acts of the Insurer or Insured, in recovering, saving, or preserving the property insured shall be considered as a WAIVER or acceptance of abandonment.

3. This insurance is against the risk of total loss and/or constructive total loss of vessel, and is also to cover its proportion as below of all claims for general average and/or salvage charges and/or claims under the four-fourths running down clause (including costs) not collectible under policies on hull and machinery, etc., by reason of the difference between the valuation expressed in those policies (or any incidental reduced valuations arising from the deduction therefrom, in process of adjustment, of any particular average or other claim involved) and the value for purposes of contribution in general average and/or salvage, or for purposes of collision liability. The proportion of such claims payable by this policy shall be such proportion as the sum hereby insured bears either to the difference between the vessel's valuation as expressed in the policies on Hull and Machinery (or as above) and her valuation for purposes of contribution in general average and/or salvage or for purposes of collision liability—or to the total sum insured against excess liabilities if it exceeds such difference. To follow Hull Underwriters in the event of total or constructive or compromised total loss.

4. This insurance also specially to cover total loss or constructive total loss of Hull and Machinery through negligence of Master, Mariners, Engineers, or Pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the Machinery or Hull, or from explosions, riots, or other causes of whatsoever nature, arising either on shore or otherwise, howsoever, causing loss of the property hereby insured, provided such loss has not resulted from want of due diligence by the owners of the ship or any of them, or by the Manager.

5. In ascertaining whether the Vessel is a constructive total loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account.

6. Warranted free of capture, seizure, arrest, restraint, or detainment, and the consequences thereof or of any attempt thereat (piracy excepted), and also from all consequences of hostilities or warlike operations whether before or after declaration of war.

7. In the event of any breach of warranty or DEVIATION from the conditions of this policy, it is agreed to hold the assured covered; the premium to be arranged.

8. Should the vessel at the expiration of this policy be at sea, or in distress, or at a port of refuge, or of call, she shall, provided previous notice be given to the Underwriters, be held covered at a pro rata monthly premium to her port of destination.

9. To Return 1 per cent. for every 15 days the Vessel may be in Port or in Dock, during such period the Vessel being at the risk of the Underwriters; and having leave to dock, undock, and change docks, &c.; and 10 per cent. for every 15 days of uncompleted time, if this insurance be cancelled, and arrival. A period in part fulfilling between two Insurances to be allowed for pro rata on dock, Underwriters on each Insurance agreeing to pay their pro rata proportion of the Return due. } on 25/- rate.

10. The above clauses and conditions are additional to those contained in the Annexed Policy, and so far as they are inconsistent therewith are to supersede the same.

Returns on 10d. each 15 days laid up.
30/- rate 1/- each 15 days - cancelled.

This slip is no part of the policy, and is not to be attached thereto, but is to be considered as binding in honour on the underwriters; the assured however having permission to remove it from this policy should they so desire

11. Full interest admitted; the policy being deemed sufficient proof of interest.

12. This insurance is without benefit of Salvage.

67

46

Exhibit 2, Annexed to Plaintiffs' Exhibit 1.

B. G.

£ _____

(No.)

Insured with:—

Be it known that WILLIS, FABER & CO., Ltd.
For account of whom it may concern.

as well in their own Name, as for and in the Name and Names of all and every other Person or Persons to whom the same doth, may, or shall appertain, in part or in all, doth make Insurance, and cause themselves and them, and every of them, to be insured, lost or not lost, at and from

say for and during the space of Twelve Calendar Months
commencing at Noon on the 1st. May, 1918
and ending at Noon on the 1st. May, 1919
beginning and ending with Greenwich Mean Time.

£ Brit. Dom. Co
£ Marchants Co,
£ London & Prov. Co.
£ World Co.
£ Lloyd's U/rs.

upon any kind of Goods and Merchandises, and also upon the Body, Tackle, Apparel, Ordnance, Munition, Artillary, Boat and other Furniture, of and in the good Ship or Vessel, called the

The Underwriters on this Policy hereby consent to give Willis, Faber & Co., Ltd., an immediate right of set off in the event of claim.

whereof is Master, under God, for this present Voyage.

or whosoever else shall go for Master in the said Ship, or by whatsoever other Name or Names the same Ship, or the Master thereof, is or shall be named or called; beginning the Adventure upon the said Goods and Merchandises from the loading thereof aboard the said Ship as above

upon the said Ship, &c.

and shall so continue and endure, during her Abode there, upon the said Ship, &c.; and further, until the said Ship, with all her Ordnance, Tackle, Apparel, &c., and Goods and Merchandises whatsoever, shall be arrived at as above upon the said Ship, &c., until she hath moored at Anchor Twenty-four Hours in good safety, and upon the Goods and Merchandises, until the same be there discharged and safely landed; and it shall be lawful for the said Ship, &c., in this Voyage, to proceed and sail to, and touch and stay at any Ports or Places whatsoever

without prejudice to this Insurance. The said Ship, &c., Goods and Merchandises, &c., for so much as concerns the Assured, by Agreement between the Assured and the Assurers in this Policy, are and shall be valued at, say as

FREIGHT as attached.

Touching the Adventures and Perils which we the Assurers are contented to bear and do take upon us in this Voyage, they are of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Counter-Mart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes, and Peoples, of what Nation, Condition, or Quality soever, Barratry of the Master and Mariners, and of all other Perils, Losses, and Misfortunes that have or shall come to the Hurt, Detriment, or Damage of the said Goods and Merchandises, and Ship, &c., or any Part thereof; and in case of any Loss, or Misfortune, it shall be lawful to the Assured, their Factors, Servants, and Assigns, to sue, labour, and travel for, in and about the Defence, Safeguard and Recovery of the said Goods and Merchandises, and Ship, &c., or any Part thereof, without Prejudice to this Insurance; to the Charges whereof we, the Assurers, will contribute, each one according to the Rate and Quantity of his sum herein Assured. And it is expressly declared and agreed that no acts of the Insurer or Insured in recovering, saving, or preserving the property insured, shall be considered as a waiver or acceptance of abandonment. And it is agreed by us, the Insurers, that this Writing or Policy of Assurance shall be of as much force and effect as the surest Writing or Policy of Assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London. And so we the Assurers are contented, and do hereby promise and bind ourselves, each one for his own Part, our Heirs, Executors, and Goods, to the Assured, their Executors, Administrators, and Assigns, for the true Performance of the Premises, confessing ourselves paid the Consideration due unto us for this Assurance by the Assured at and after the Rate of

per cent.

Thirty two shillings and sixpence

In WITNESS whereof, we the Assurers have subscribed our Names and Sums assured in

London, 30th. June 1918

Warranted free of capture, seizure, arrest, restraint, or detainment, and the consequences thereof or of any attempt thereat (piracy excepted), and also from all consequences of hostilities or warlike operations, whether before or after declaration of war.

N.B.—Corn, Fish, Salt, Fruit, Flour and Seed are Warranted free from Average, unless general, or the Ship be stranded; Sugar, Tobacco, Hemp, Flax, Hides, and Skins are Warranted free from Average under Five Pounds per Cent.; And all other Goods, also the Ship and Freight, are Warranted free from Average under Three Pounds per Cent. unless general, or the Ship be stranded.

5296

as per margin

In WITNESS whereof, we the Assurers have subscribed our Names and Sum Insured at London, 29th June 1918

Warranted free of Capture, seizure, arrest, restraint, or detainment, and the consequences thereof or of any attempt thereat (piracy excepted), and also from all consequences of hostilities or warlike operations whether before or after declaration of war.

N.B.—Corn, Fish, Salt, Fruit, Flour and Seed are Warranted free from Average, unless general or the Ship be stranded; Sugar, Tobacco, Hemp, Flax, Hides, and Skins are Warranted free from Average under Five Pounds per Cent.; and all other Goods, also the Ship and Freight, are Warranted free from Average under Three Pounds per Cent., unless general, or the Ship be stranded.

This insurance is against total loss and/or constructive total loss of vessel.
Including Excess Liabilities as per clause attached.
Including the conditions of the printed clauses attached.

This is to certify that we hold duly stamped and signed Policies of Insurance in accordance with this pro-forma, as detailed in margin hereof.

WILLIS, FABER & CO. LTD

66

Exhibit 2 a.c.alld

Warranted free of capture, seizure, arrest, restraint, or detainment, and the consequences thereof or of any attempt thereat (piracy excepted), and also from all consequences of hostilities or warlike operations whether before or after declaration of war.

N.B.—Corn, Fish, Salt, Fruit, Flour and Seed are Warranted free from Average, unless general, or the Ship be stranded; Sugar, Tobacco, Hemp, Flax, Hides, and Skins are Warranted free from Average under Five Pounds per Cent.; and all other Goods, also the Ship and Freight, are Warranted free from Average under Three Pounds per Cent. unless general, or the Ship be stranded.

SUBJECT TO THE CONDITIONS OF THE PRINTED CLAUSES

to certify that we hold duly signed by undersigned Policy of Insurance in accordance with this proposal, as specified in terms known

WILLIS, FABER & CO. LTD

A. C. Allan

Exhibit 3

Exhibit 3, Annexed to Plaintiffs' Exhibit 1.

No. 189.

W. F. & Co., Ltd.
Tens. (Presents, &c.).

Attaching to policy for £ 5625

per Alexandre 5

As employment may offer, in Port and at Sea, in Docks and Graving Docks, and on Ways, Gridirons, and Pontoons, at all times, in all places, and on all occasions, services, and trades whatsoever, and wheresoever, under steam or sail; with leave to sail with or without Pilots, TO TOW AND BE TOWED, and to assist Vessels and/or Craft in all situations and to any extent, and to go on trial trips. Including all risk incidental to Steam and Steam Navigation. With liberty to discharge, exchange, and take on board, Goods, Specie, Passengers and Stores, wherever the Vessel may call at or proceed to without being deemed a deviation, and with liberty to carry Goods, live Cattle, &c., on deck or otherwise. Including all risk of craft and/or raft and/or boats to and from the Vessel. Including all risks of docking, undocking, changing docks, or moving in harbour and going on or off gridiron or graving dock as often as may be done during the currency of this policy.

And it is expressly declared and agreed that no acts of the Insurer or Insured, in recovering, saving, or preserving the property insured shall be considered as a WAIVER or acceptance of abandonment.

This insurance also specially to cover loss or damage through the negligence of Master, Mariners, Engineers or Pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the Machinery or Hull, or from explosions, riots, or other causes of whatsoever nature, arising either on shore or otherwise, howsoever, causing loss of or injury to the property hereby insured, provided such loss or damage has not resulted from want of due diligence by the owners of the ship or any of them, or by the Manager.

Warranted free from Average under Three per cent., unless general or the vessel be stranded, sunk, burnt, on fire, or in collision.

General Average and Salvage charges as per Foreign Custom, payable as per Foreign Statement and/or, if in accordance with the Contract of affreightment, per York-Antwerp Rules.

Warranted free of capture, seizure, arrest, restraint, or detainment, and the consequences thereof or of any attempt thereat (piracy excepted), and also from all consequences of hostilities or warlike operations whether before or after declaration of war.

Warranted free from claim consequent upon loss of time whether arising from a peril insured against or not.

In the event of any breach of warranty or DEVIATION from the conditions of this policy, it is agreed to hold the assured covered; the premium to be afterwards arranged.

Should the vessel at the expiration of this policy be at sea, or in distress, or at a port of refuge, or of call, she shall, provided previous notice be given to the Underwriters, be held covered at a pro rata monthly premium, to her port of destination.

TO RETURN £ ? not per cent. for every 15 days the Vessel may be in port or in Dock, during such period the Vessel being at the risk of the Underwriters; and having leave to dock, undock, and change docks, &c.; and ?? not per cent. for every days of unexpired time, if this Insurance be cancelled, and arrival. A period in port falling between two Insurances to be allowed for pro rata on each, Underwriters on each Insurance agreeing to pay their pro rata proportion of the Return due.

It is agreed that these clauses shall be considered to supersede and annul any clauses to the same or similar effect, which may be printed in or attached to this policy, and for the purposes of construction these clauses shall be deemed of the nature of written additions to the policy.

This slip is not to be attached to the policy, and the assured has permission to detach it from the clauses above should the policy have to be produced in a Court of Law

Full interest admitted in the event of total loss and/or constructive total loss of Vessel; the policy being deemed sufficient proof of interest.

ON FREIGHT including advanced charges (in and/or over) chartered and/or otherwise, on board or not on board.

To attach and cover (whether waterborne or not) from the time the goods come into the possession of the assured on their wharves before loading and are appropriated to the vessel, and to continue after discharge while on their wharves until delivery to consignees or succeeding carriers.

The intent and purport of this policy is to cover and protect the assured the same as though separate policies were issued for each trip during the currency of same.

Attached to policy for £ 5625 per Alexandre s.s. 69

48

Exhibit 4, Annexed to Plaintiffs' Exhibit 1.

c.c.

$ 2500

(No. 56207)

[redacted], FABER & CO., Ltd.

[redacted] For account of whom it may concern.

as within their [redacted] the Name and Names of all and every other Person or Persons to whom the same doth, may, or shall appertain, in part or in all, doth make Assurance, and [redacted] themselves and each and every of them, to be Insured, lost or not lost, at and from

Say for and during the space of Twelve Calendar Months
[redacted] on the 1st day of May, 1918
and ending at Noon on the 1st day of May, 1919
beginning and ending with Greenwich Mean Time

London Assce.

upon any Kind of Goods and Merchandises, and also upon the Body, Tackle, Apparel, Ordnance, Munition, Artillery, Boat and other Furniture, of and in the good Ship or Vessel, called the

Almirante

whereof is Master, under God, for this present Voyage,
or whosoever else shall go for Master in the said Ship, or by whatsoever other Name or Names the same Ship, or the Master thereof, is or shall be named or called; beginning the Adventure upon the said Goods and Merchandises from the loading thereof aboard the said Ship as above
upon the said Ship, &c.

and shall so continue and endure, during her Abode there.
upon the said Ship, &c.; and further, until the said Ship, with all her Ordnance, Tackle, Apparel, &c., and Goods and Merchandises whatsoever, shall be arrived at as above
upon the said Ship, &c., until she hath moored at Anchor Twenty-four Hours in good safety, and upon the Goods and Merchandises, until the same be there discharged and safely landed; and it shall be lawful for the said Ship &c., in this Voyage, to proceed and sail to, and touch and stay at any Ports or Places whatsoever

without prejudice to this Insurance. The said Ship, &c., Goods and Merchandises, &c., for so much as concerns the Assured, by Agreement between the Assured and the Assurers in this Policy, are and shall be valued at, say on

DISBURSEMENTS Valued at total sum insured.

Touching the Adventures and Perils which we the Assurers are contented to bear and do take upon us in this Voyage, they are of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Counter-Mart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes, and Peoples, of what Nation, Condition, or Quality soever, Barratry of the Master and Mariners, and of all other Perils, Losses, and Misfortunes that have or shall come to the Hurt, Detriment, or Damage of the said Goods and Merchandises, and Ship, &c., or any Part thereof; and in case of any Loss or Misfortune, it shall be lawful to the Assured, their Factors, Servants, and Assigns, to sue, labour, and travel for, in and about the Defence, Safeguard and Recovery of the said Goods and Merchandises, and Ship, &c., or any Part thereof, without Prejudice to this Insurance; to the Charges whereof we, the Assurers, will contribute, each one according to the Rate and Quantity of his sum herein Assured. And it is expressly declared and agreed that no acts of the Insurer or Insured in recovering, saving, or preserving the property insured, shall be considered as a waiver or acceptance of abandonment. And it is agreed by us, the Insurers, that this Writing or Policy of Assurance shall be of as much force and effect as the surest Writing or Policy of Assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London. And we the Assurers are contented, and do hereby promise and bind ourselves, each one for his own Part, our Heirs, Executors, and Goods, to the Assured, their Executors, Administrators, and Assigns, for the true Performance of the Premises, confessing ourselves paid the Consideration due unto us for this Assurance by the Assured at and after the Rate of

per cent.

Twenty five shillings

In WITNESS whereof, we the Assurers have subscribed our Names and Sums Assured.

London, 20th May June 1918

Warranted free of capture, seizure, arrest, restraint, or detainment, and the consequences thereof or of any attempt thereat (piracy excepted), and also from all consequences of hostilities or warlike operations whether before or after declaration of war.

N.B.—Corn, Fish, Salt, Fruit, Flour and Seed are Warranted free from Average, unless general, or the Ship be stranded; Sugar, Tobacco, Hemp, Flax, Hides, and Skins are Warranged free from Average under Five Pounds per Cent.; and all other Goods, also the Ship and Freight, are Warranted free from Average under Three Pounds per Cent unless general, or the Ship be stranded.

Exhibit 4, Annexed to Plaintiffs' Exhibit 1.

Attaching to policy for £ 60-0

and forming part thereof.

1. As employment may offer, in Port and at Sea, in Docks and Graving Docks, and on Ways, Gridirons, and Pontoons, at all times, in all places, and on all occasions, services, and trades whatsoever, and wheresoever, under steam or sail; with leave to sail with or without Pilots, TO TOW AND BE TOWED, and to assist Vessels and/or Craft in all situations and to any extent, and to go on trial trips. Including all risk incidental to Steam and Steam Navigation. With liberty to discharge, exchange, and take on board, Goods, Specie, Passengers and Stores, wherever the Vessel may call at or proceed to without being deemed a deviation, and with liberty to carry Goods, Live Cattle, &c., on deck or otherwise. Including all risks of docking, undocking, changing docks, or moving in harbour and going on or off gridirons or graving dock as often as may be done during the currency of this policy.

2. And it is expressly declared and agreed that no acts of the Insurer or Insured, in recovering, saving, or preserving the property insured shall be considered as a WAIVER or acceptance of abandonment.

3. This insurance is against the risk of total loss and/or constructive total loss of vessel, and is also to cover its proportion as below of all sums for general average and/or salvage and/or special charges and/or claims under the four-fourths running down clause (including costs) not collectible under policies on hull and machinery, etc., by reason of the difference between the valuation expressed in those policies (or any incidental reduced valuations arising from the deduction therefrom, in process of adjustment, of any particular average or other claim involved) and the value for purposes of contribution to general average and/or salvage and/or special charges and/or for purposes of collision liability. The proportion of such claims payable by this policy shall be such proportion as the sum hereby insured bears either to the difference between the vessel's valuation as expressed in the policies on Hull and Machinery (or as above) and her valuation for purposes of contribution to general average and/or salvage and/or special charges and/or for purposes of collision liability, or to the total sum insured against excess liabilities if it exceeds such difference. To follow Hull Underwriters in the event of total or constructive or compromised total loss.

4. This insurance also specially to cover total loss or constructive total loss of Hull and Machinery through negligence of Master, Mariners, Engineers, or Pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the Machinery or Hull, or from explosions, riots, or other causes of whatsoever nature, arising either on shore or otherwise, howsoever, causing loss of the property hereby insured, provided such loss has not resulted from want of due diligence by the owners of the ship or any of them, or by the Manager.

5. In ascertaining whether the Vessel is a constructive total loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account.

6. Warranted free of capture, seizure, arrest, restraint, or detainment, and the consequences thereof or of any attempt thereat (piracy excepted), and also from all consequences of hostilities or warlike operations, whether before or after declaration of war.

7. In the event of any breach of warranty or DEVIATION from the conditions of this policy, it is agreed to hold the assured covered; the premium to be arranged.

8. Should the vessel at the expiration of this policy be at sea, or in distress, or at a port of refuge, or of call, she shall, provided previous notice be given to the Underwriters, be held covered at a pro rata monthly premium, to her port of destination.

9. To RETURN ½ per cent. for every 15 days the Vessel may be in Port or in Dock, during such period the Vessel being at the risk of the Underwriters; and having leave to dock, undock, and change docks, &c.; and 10 - per cent. for every 15 days of unexpired time, if this insurance be cancelled, and arrival. A period in part falling between two Insurances to be allowed for pro rata on each, Underwriters on each Insurance agreeing to pay their pro rata proportion of the Return due.

10. The above clauses and conditions are additional to those contained in the Annexed Policy, and so far as they are inconsistent therewith are to supersede the same.

This slip is no part of the policy, and is not to be attached thereto, but is to be considered as binding in honour on the underwriters; the assured however having permission to remove it from this policy should they so desire.

11. Full interest admitted; the policy being deemed sufficient proof of interest.

12. This insurance is without benefit of Salvage.

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50

[fol. 72] EXHIBIT 5, ANNEXED TO PLAINTIFFS' EXHIBIT 1

(Copy)

Marine Department,

Ætna Insurance Company,

Hartford, Connecticut

Talbot, Bird & Co., Inc.,

General Agents,

63-65 Beaver Street.

New York, October 28th, 1918.

Messrs. Johnson and Higgins, Adjusting Department, 49 Wall Street, New York City, N. Y.

S. S. "Almirante"

GENTLEMEN:

We are in receipt of your favors of the 25th inst., tendering abandonment of this vessel to the underwriters represented by us, for which we thank you. Beg to state that we hereby decline to accept same, as is customary.

Yours for Unconditional Surrender, Ætna Insurance Company, Franklin Fire Insurance Company, National Insurance Company of Copenhagen, Talbot, Bird & Co., Inc., Gen. Ag'ts, (Sgd.) J. S. Gilbertson, Director.

JSG:w.

[fol. 73] PLAINTIFFS' EXHIBIT 2

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

L 57-273

BOSTON INSURANCE COMPANY, Plaintiff,

against

UNITED FRUIT COMPANY, Defendant

The following facts are hereby stipulated for the purpose of trial, subject to any objection which may be made to the

admission into evidence of any of said facts upon the trial on any ground other than the ground that the facts are not sufficiently proved:

1. That at all the times mentioned in the complaint, plaintiff was, and now is, a corporation organized and existing under and by virtue of the laws of the State of Massachusetts, and a citizen and inhabitant of said State, having an office and place of business at No. 116 John Street, County, Southern District, and State of New York.

2. That plaintiff's policy No. 75,285 in the possession of defendant, is the policy referred to in paragraph "3" of the complaint, and may be admitted in evidence.

3. That the defendant procured other policies of insur- [fol. 74] ance on the S. S. "Almirante" in the amount of £65,105, upon the terms and conditions set forth in Exhibits, "1", "2", "3" and "4" annexed hereto.

4. That the letter dated October 25, 1918, from Johnson & Higgins to plaintiff, copy of which is attached to the answer as Schedule "A", was received by the plaintiff; that no efforts were ever made to salve the "Almirante"; and on or about December 16, 1918, plaintiff paid to Johnson & Higgins for defendant, a total loss under its policy No. 75,285. Annexed hereto are copies of the payment order signed by defendant marked Exhibit "5" and receipt signed by Johnson & Higgins marked Exhibit "6".

5. That the defendant also collected £65,105 from the underwriters who issued the policies referred to in paragraph "3" hereof.

6. That the S. S. "Hisko", which collided with the S. S. "Almirante", was owned by the United States of America.

7. That the plaintiff and defendant and the other hull underwriters who had issued policies similar to plaintiff's policy No. 75,285, jointly retained Kirlin, Woolsey & Hickox and its successor firms Kirlin, Woolsey, Campbell, Hickox & Keating, and Kirlin, Campbell, Hickox, Keating & McGrann, to prosecute the claim for damages occasioned by the loss of the S. S. "Almirante" against the United States of America.

8. That said attorneys, pursuant to their retainer and pursuant to instructions from the defendant and plaintiff [fol. 75] and other hull underwriters, procured the passage of a Special Act authorizing suit against the United States of America.

9. That the copy of said Special Act attached to the answer as Schedule "B" is a correct copy of said Act; and that no further proof of said Act shall be necessary.

10. That thereafter said attorneys, pursuant to their retainer by the defendant and plaintiff and other hull underwriters, and by their express instructions, filed suit in the name of the owner of the S. S. "Almirante" in the United States District Court for the Southern District of New York against the United States as owner of the S. S. "Hisko", under the Special Act of Congress above referred to, and recovered the sum of $1,761,693.02 as the actual value of the S. S. "Almirante" and her equipment at the time of her loss.

11. That payment of this judgment was received by said attorneys on July 26, 1932.

12. That, in accordance with the provisions of the Act of Congress under which the suit was brought, no interest was allowed on the recovery; and no interest was, in fact, recovered.

13. That the reasonable and necessary legal and other expenses in respect of said litigation, after deduction of taxable costs recovered, amounted to $300,024.33.

14. That on September 27, 1932 and November 25, 1932, a portion of said recovery was paid over by said attorneys to Messrs. Johnson & Higgins for distribution to the various [fol. 76] underwriters, including the plaintiff; and the balance of said net recovery was paid over by said attorneys to the defendant herein.

15. Thereafter Johnson & Higgins, out of the funds in their hands, paid to the plaintiff the amounts alleged in paragraph "Seventh" of the complaint.

In WITNESS whereof, we the Assurers have subscribed our Names and Sums Insured

London, 20th June 1918

Warranted free of capture, seizure, arrest, restraint, or detainment, and the consequences thereof or of any attempt thereat (piracy excepted), and also from all consequences of hostilities or warlike operations whether before or after declaration of war.

N.B.—Corn, Fish, Salt, Fruit, Flour and Seed are Warranted free from Average, unless general, or the Ship be stranded; Sugar, Tobacco, Hemp, Flax, Hides, and Skins are Warranted free from Average under Five Pounds per Cent.; and all other Goods, also the Ship and Freight, are Warranted free from Average under Three Pounds per Cent. unless general, or the Ship be stranded.

This insurance is against total loss and/or constructive total loss of vessel and/or excess liability under the 4/4ths Collision Clause in Hull policies, as per clause 3 in form attached.
Including the conditions of the printed clauses attached.

WILLIS. FABER & Co. Ltd

Exhibit 4. A. C. Allan 70

16. That the sum of $14,037.71, which was paid to the plaintiff as alleged in paragraph "Seventh" of the complaint, was arrived at as follows:

Plaintiff was credited with the amount of its payment to the defendant	$15,815.00
Less plaintiff's proportion, 15,815/632610ths, of $500.00 received on the sale of lifeboats recovered	12.50
	$15,802.50
Add bank interest earned on $15,802.50 from July 26, 1932, the date on which the judgment was paid by the United States, until the plaintiff received the payments alleged in paragraph "Seventh" of the complaint	33.32
	$15,835.82
Deducted by defendant on account of legal fees and other expenses set forth in the recovery statement hereinafter referred to	1,798.11
Paid to plaintiff	$14,037.71

[fol. 77] 17. The recovery statement issued by Johnson & Higgins under date of November 22, 1932, or any part thereof, may be offered in evidence by either party as prima facie evidence of any of the facts stated therein,—it being understood, however, that this stipulation is not to be construed as an admission by the plaintiff that the division and apportionment of the recovery as shown therein is proper.

18. As evidence of the course of the proceedings which led to the recovery here involved, either party may refer to any of the court decisions which were rendered in those proceedings.

Dated, New York, September 23, 1936.

Bigham, Englar, Jones & Houston, Attorneys for Plaintiff. Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for Defendant.

Exhibits 1, 2, 3 and 4, annexed to Plaintiffs' Exhibit #2 are the same as 1, 2, 3 and 4, annexed to Plaintiffs' Exhibit

#1 photoprinted at pages 65-71 of this record and are therefore omitted pursuant to stipulation.

[fol. 78] EXHIBIT 5, ANNEXED TO PLAINTIFFS' EXHIBIT 2

Sep. 11, 1918.

To Boston Ins. Co.:

Please pay to Messrs. Johnson & Higgins, the amount shown to be due on your policy on steamer "Almirante" for $15815 a/c accident Total Loss Sept. 6, 1918.

United Fruit Company, (Signature illegible), Assistant Treasurer.

EXHIBIT 6, ANNEXED TO PLAINTIFFS' EXHIBIT 2

Duplicate

$15815#. New York, Dec. 16, 1918.

Received of the Boston Insurance Company, Fifteen thousand eight hundred fifteen # Dollars, In full for a/c of Hull S/S. "Almirante" from N. Y. to Havana insured under policy No. 75285.

For Johnson & Higgins, G. C. Bjur.

896524.

(On side) No. 5172 Assured United Fruit Co.

[fol. 79] PLAINTIFFS' EXHIBIT 3

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

BOSTON INSURANCE COMPANY, Plaintiff,

against

UNITED FRUIT COMPANY, Defendant,

L 57-273

The following facts are hereby stipulated for the purpose of trial, subject to any objection which may be made to the admission into evidence of any of such facts upon the trial

on any ground other than the ground that the facts are not sufficiently proved:

1. Exhibit 7, annexed hereto, is a photostatic copy of plaintiff's printed form of subrogation receipt which plaintiff sent to Johnson & Higgins, for execution by the defendant, together with a check in payment of a total loss under its policy. Johnson & Higgins added the handwriting insertion, "to the extent of $15815.00" shown on the receipt and then had the receipt signed by the defendant and returned to the plaintiff. Plaintiff retained said receipt as executed by the defendant without complaint or protest.

2. That the plaintiff was not a party to the agreement mentioned in the last paragraph of page 4 of the statement of recovery.

[fol. 80] 3. That all English underwriters paid a total loss to brokers in London in Sterling. These funds were transmitted through brokers to the owner. The owner received these funds at the rate of exchange of $4.75¾.

Bigham, Englar, Jones & Houston, Attorneys for Plaintiff. Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for Defendant.

EXHIBIT 7, ANNEXED TO PLAINTIFFS' EXHIBIT 3

$15815.— B2465-8.

Subrogation Receipt

Received of the Boston Insurance Company, Boston, Massachusetts, Fifteen thousand eight hundred fifteen Dollars, in full payment, release and discharge of all claims or demands against the said Company, arising from or connected with total loss to Hull S/S. "Almirante" S/S "Hisco" which loss or damage arose or occurred on or about the — day of ——, 19—; and in full payment, release and discharge of all claims or demands against the said Company under the certain Policy of insurance made by said Company and numbered 75285, arising from or connected with any such loss or damage; and for and in consideration of such payment the undersigned hereby assigns [fol. 81] and transfers to the said Company all claims and

demands against any person, persons, vessels, or property, arising from or connected with such loss or damage, and the said Company is subrogated to all rights of the undersigned with respect to said loss or damage.

We do hereby sell, assign and transfer to said Boston Insurance Company all our rights and interest in the above to the extent of $15815.00 to have and to hold the same to the said Company its successors and assigns to their own use forever.

Dated this 28 day of Jan. 1919, at New York.

United Fruit Company, by John W. Damon, Treasurer.

5172.
896254.

[fol. 82] PLAINTIFFS' EXHIBIT 4

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

L 57-272

UNION MARINE & GENERAL INSURANCE COMPANY, LIMITED, Formerly Union Marine Insurance Company, Limited, Plaintiff,

against

UNITED FRUIT COMPANY, Defendant

The following facts are hereby stipulated for the purpose of trial, subject to any objection which may be made to the admission into evidence of any of said facts upon the trial on any ground other than the ground that the facts are not sufficiently proved:

1. That at all the times mentioned in the complaint, plaintiff was, and now is, a corporation organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Northern Ireland, having an office and place of business at No. 116 John Street, County, Southern District, and State of New York.

2. That plaintiff's policy No. 351 in the possession of defendant, is the policy referred to in paragraph "3" of the complaint, and may be admitted in evidence.

[fol. 83] 3. That the defendant procured other policies of insurance on the S.S. "Almirante" in the amount of

£65,105, upon the terms and conditions set forth in Exhibits "1", "2", "3" and "4" annexed hereto.

4. That the letter dated October 25, 1918, from Johnson & Higgins to plaintiff, copy of which is attached to the answer as Schedule "A", was received by the plaintiff; that on or about October 26, 1918, plaintiff wrote to Johnson & Higgins the letter, copy of which is attached hereto marked Exhibit "5"; that no efforts were ever made to salve the "Almirante"; and on or about December 5, 1918, plaintiff paid to defendant a total loss under its policy No. 351.

5. That the defendant also collected £65,105 from the underwriters who issued the policies referred to in paragraph "3" hereof.

6. That the S.S. "Hisko", which collided with the S.S. "Almirante", was owned by the United States of America.

7. That the plaintiff and defendant and the other hull underwriters who had issued policies similar to plaintiff's policy No. 351, jointly retained Kirlin, Woolsey & Hickox and its successor firms Kirlin, Woolsey, Campbell, Hickox & Keating, and Kirlin, Campbell, Hickox, Keating & McGrann, to prosecute the claim for damages occasioned by the loss of the S.S. "Almirante" against the United States of America.

8. That said attorneys, pursuant to their retainer and pursuant to instructions from the defendant and plaintiff [fol. 84] and other hull underwriters, procured the passage of a Special Act authorizing suit against the United States of America.

9. That the copy of said Special Act attached to the answer as Schedule "B" is a correct copy of said Act; and that no further proof of said Act shall be necessary.

10. That thereafter said attorneys, pursuant to their retainer by the defendant and plaintiff and other hull underwriters, and by their express instructions, filed suit in the name of the owner of the S.S. "Almirante" in the United States District Court for the Southern District of New York against the United States as owner of the S.S. "Hisko", under the Special Act of Congress above referred to, and recovered the sum of $1,761,693.02 as the

actual value of the S.S. "Almirante" and her equipment at the time of her loss.

11. That payment of this judgment was received by said attorneys on July 26, 1932.

12. That, in accordance with the provisions of the Act of Congress under which the suit was brought, no interest was allowed on the recovery; and no interest was, in fact, recovered.

13. That the reasonable and necessary legal and other expenses in respect of said litigation, after deduction of taxable costs recovered, amounted to $300,024.33.

14. That on September 27, 1932 and November 25, 1932, a portion of said recovery was paid over by said attorneys to Messrs. Johnson & Higgins for distribution to the vari-
[fol. 85] ous underwriters, including the plaintiff; and the balance of said net recovery was paid over by said attorneys to the defendant herein.

15. Thereafter Johnson & Higgins, out of the funds in their hands, paid to the plaintiff the amounts alleged in paragraph "Seventh" of the complaint.

16. That the sum of $5,615.08, which was paid to the plaintiff as alleged in paragraph "Seventh" of the complaint, was arrived at as follows:

Plaintiff was credited with the amount of its payment to the defendant	$6,326.00
Less plaintiff's proportion, 6326/632610ths, of $500.00 received on the sale of lifeboats recovered	5.00
	$6,321.00
Add bank interest earned on $6,321. from July 26, 1932, the date on which the judgment was paid by the United States, until the plaintiff received the payments alleged in paragraph "Seventh" of the complaint	13.33
	$6,334.33
Deducted by defendant on account of legal fees and other expenses set forth in the recovery statement hereinafter referred to	719.25
Paid to plaintiff	$5,615.08

[fol. 86] 17. The recovery statement issued by Johnson & Higgins under date of November 22, 1932, or any part thereof, may be offered in evidence by either party as prima facie evidence of any of the facts stated therein—it being understood, however, that this stipulation is not to be construed as an admission by the plaintiff that the division and apportionment of the recovery as shown therein is proper.

18. As evidence of the course of the proceedings which led to the recovery here involved, either party may refer to any of the court decisions which were rendered in those proceedings.

Dated, New York, June 10, 1936.

Bigham, Englar, Jones & Houston, Attorneys for Plaintiff. Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for Defendant.

Exhibits 1, 2, 3 and 4 annexed to Plaintiffs' Exhibit #4 are the same as Exhibits 1, 2, 3 and 4 annexed to Plaintiffs' Exhibit #1 photoprinted at pages 65-71 of this record and are therefore omitted pursuant to stipulation.

[fol. 87] EXHIBIT 5, ANNEXED TO PLAINTIFFS' EXHIBIT 4

(Copy)

The Union Marine Insurance Co., Limited of Liverpool

UM.

United States Branch,
27 William Street
New York, October 26, 1918.

In reply please quote FHC/CM. Your Ref. JPN-KM.

Messrs. Johnson & Higgins, 49-51 Wall Street, New York City.

DEAR SIRS:

"Almirante" (S)

We beg to acknowledge receipt of your favor of yesterday's date and in reply regret that we must decline to accept the abandonment tendered therein.

Yours faithfully, (Sd.) Frank H. Canty, Assistant Manager.

[fol. 88] PLAINTIFFS' EXHIBIT 5

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

L 57-272

UNION MARINE & GENERAL INSURANCE COMPANY, LIMITED, Formerly Union Marine Insurance Company, Limited, Plaintiff,

against

UNITED FRUIT COMPANY, Defendant

The following facts are hereby stipulated for the purpose of trial, subject to any objection which may be made to the admission into evidence of any of such facts upon the trial on any ground other than the ground that the facts are not sufficiently proved:

1. Exhibit 6, annexed hereto, is a photostatic copy of plaintiff's printed form of subrogation receipt which plaintiff sent to Johnson & Higgins, for execution by the defendant, together with a check in payment of a total loss under its policy. Johnson & Higgins added the handwriting insertions shown on the receipt and then had the receipt signed by the defendant and returned to the plaintiff. Plaintiff retained said receipt as executed by the defendant without complaint or protest.

2. That the plaintiff was not a party to the agreement mentioned in the last paragraph of page 4 of the statement of recovery.

[fol. 89] 3. That all English underwriters paid a total loss to brokers in London in Sterling. These funds were transmitted through brokers to the owner. The owner received these funds at the rate of exchange of $4.75¾.

Bigham, Englar, Jones & Houston, Attorneys for Plaintiff. Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for Defendant.

EXHIBIT 6, ANNEXED TO PLAINTIFFS' EXHIBIT 5

To the Union Marine Insurance Company, Limited, New York.

DEAR SIRS:

In consideration of your paying our claim for Total loss on Hull of "Almirante" (S) and insured under Policy #351 we hereby assign to you all of our rights and claims to any sum or sums of money to the extent of but not exceeding $6326.— which may be payable to, or recoverable by us, or in our names, in respect of the under-mentioned interest, whether on account of Salvage therefrom or on any other account whatever, and we authorize you to use our names in any action or proceedings you may be advised to bring with respect to any of the above mentioned matters and we undertake ourselves to do or concur in any matters or proceedings which you may deem expedient or [fol. 90] necessary in any such action or proceedings and generally to assist therein by all means in our power. We further undertake if called upon by you so to do ourselves to undertake any such action or proceedings as you may direct on your behalf, it being understood that you are to indemnify us against any costs, charges or expenses to be incurred in respect of any proceedings to the extent of but not exceeding $6326— taken by virtue of this agreement.

Signed in duplicate this 28th day of January 1919.

United Fruit Company, by Jchn W. Damon, Treasurer.

Description of Interest Above Referred to: above steamer sunk in collision September 6th, 1918.

Our File #12183.

AMERICAN HULL POLICY
1916 Form

Plaintiffs' Exhibit 6.

Original. No. 6315

Aetna Insurance Company

HARTFORD, CONNECTICUT

Original and duplicate policies issued, one of which being accomplished, the other to stand null and void.

For Account of Whom it may concern

Loss, if any, payable to As per form attached.

Do make insurance and cause United Fruit Company and/or Elders & Fyffes Ltd. et al

To be insured, lost or not lost, to the amount of Four Hundred Eighty-five Thousand two hundred fifteen----- Dollars

At and from the 1st day of May , 1918.

Until the 1st day of May , 1919.

(Beginning and ending with Greenwich mean time).. Noon.

Warranted as follows. Ori-

Attached to Policy No. [illegible]

Upon the body, tackle, apparel, stores, ordnance, munitions, artillery, boats and other furniture, boilers and machinery of the Steamship called the

As per form attached. S. S.

or by whatsoever name or names the said Vessel is or shall be named or called; beginning the adventure upon the said Vessel, &c., as above, and so shall continue and endure during the period aforesaid, as employment may offer, in port and at sea, in docks and graving docks, and on ways, gridirons and pontoons, at all times, in all places, and on all occasions, services and trades whatsoever and wheresoever, under steam or sail; with leave to sail with or without pilots, to tow and be towed, and to assist vessels and/or craft in all situations and to any extent, and to go on trial trips. With liberty to discharge, exchange and take on board goods, specie, passengers, and stores, wherever the Vessel may call at or proceed to, and with liberty to carry goods, live cattle, &c., on deck or otherwise, but warranted free of any claim in respect of deck cargo. Including all risks of docking, undocking, changing docks, or moving in harbour and going on or off gridiron or graving docks as often as may be done during the currency of this Policy.

The said Ship, &c., for so much as concerns the Assured, by agreement between the Assured and Assurers in this Policy, are and shall be valued at as follows:

Hull, tackle, apparel, furniture, &c., $

Boilers, machinery, &c., and everything connected therewith $

$ As per form attached.

Donkey boilers, winches, cranes, windlasses, steering gear, and electric light apparatus, shall be deemed to be part of the hull and not part of the machinery. Refrigerating machinery and insulation appertaining thereto not covered unless expressly included in this Policy, or unless the property of the owners of the Vessel.

The Insurers to be paid in consideration of this insurance Fourteen thousand five hundred fifty-six 45/100-- Dollars,

being at the rate of 3 per cent.

[illegible] managers on Disbursements, Commissions or similar interests P. P. I. or F. I. A. shall not exceed 125% of the insured valuation of the vessel, but the assured may in addition thereto effect P. P. I. or F. I. A. insurance on any of the following interests:

Premiums (reducing or not reducing monthly) to any amount actually at risk, and Freight and/or Chartered Freight and/or Anticipated Freight and/or Earnings and/or Hire or Profits on Time Charter and/or Charter for series of voyages for any amount not exceeding (in the aggregate 20% of the insured valuation of the vessel; and if the actual amount at risk on any or all of such interests shall exceed such 20% of the insured valuation of the vessel, the assured and/or their managers may, without prejudice to this warranty, insure without risk the excess of such interests reducing as earned.

Provided always that a breach of this warranty shall not afford underwriters any defence to a claim by mortgagees or other third parties who may have accepted this Policy without notice of such breach of warranty, nor shall it restrict the right of the assured and their managers to insure in addition General Average and/or Salvage [illegible]

Touching the Adventures and Perils which we, the said Assurers, are contented to bear and take upon us, they are of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Counter-Mart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and Peoples, of what nation, condition or quality soever, Barratry of the Master and Mariners, Explosions, Blots, or other causes of whatsoever nature arising either on shore or otherwise, causing Loss of or injury to the Property hereby insured, and of all other Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said Ship, &c., or any part thereof. And in case of any Loss or Misfortune, it shall be lawful for the Assured, their Factors, Servants and Assigns, to sue, labour and travel for, in and about the Defence, Safeguard and Recovery of the said Ship, &c., or any part thereof, without prejudice to this Insurance, to the Charges whereof the Assurers will contribute according to the Rate and Quantity of the sum herein assured. And it is expressly declared and agreed that no act of the Insurer or Insured in recovering, saving or preserving the property insured shall be considered as a waiver or acceptance of abandonment.

This Insurance also specially to cover (subject to the less if average warranty) loss of, or damage to hull or machinery, through the negligence of Master, Charterers, Mariners, Engineers, or Pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the Owners of the Ship, or any of them, or by the Manager. Masters, Mates, Engineers, Pilots, or Crew not to be considered as part owners within the meaning of this clause should they hold shares in the steamer.

And it is [illegible]

two of such three Arbitrators, appointed as above to be final and binding. Provided always that this clause shall in no case extend to any sum which the Assured or Charterers may become liable to pay, or shall pay for removal of obstructions under statutory powers, for injury to harbours, wharves, piers, stages, and similar structures, consequent on such collision, or in respect of the cargo or engagements of the Insured Vessel, or for loss of life, or personal injury. And provided also that in the event of any claim being made by Charterers under this clause they shall not be entitled to recover in respect of any liability to which the Owners of the Ship, if interested in this Policy at the time of the Collision in question, would not be subject, nor to a greater extent than the Shipowners would be entitled in such event to recover.

And it is further agreed that in the event of salvage, towage, or other assistance being rendered to the Vessel hereby insured by any Vessel belonging in part or in whole to the same Owners or Charterers, the value of such services (without regard to the common ownership of the Vessels) shall be ascertained by arbitration in the manner above provided for under the Collision Clause, and the amount so awarded so far as applicable to the interest hereby insured shall constitute a charge under this Policy.

General Average and salvage charges payable in accordance with York-Antwerp Rules, 1890, if so provided for in the contract of affreightment. As regards matters not provided for in the York-Antwerp Rules, 1890 (when the contract of affreightment provides for such rules), and also when the contract of affreightment does not provide for such rules, General Average and salvage charges shall be payable in accordance with the laws and usages of the United States. Provided always that when an adjustment according to the laws and usages of the port of destination is properly demanded by the owners of the cargo, General Average shall be paid in accordance with same.

No claim shall be allowed in respect of scraping or painting the Vessel's bottom except as provided in Rule of Practice VIII, of the Association of Average Adjusters of the United States.

Grounding in the Panama Canal or in the Suez Canal or in the Manchester Ship Canal or its connections, or in the River Mersey above Rock Ferry Slip, or in the River Plate (above Buenos Aires) or its tributaries, or in the Danube, Demerara, or Bilbao River or on the Yenikale or Bilbao Bar, shall not be deemed a stranding.

Average payable on each valuation separately or on the whole, without deduction of thirds, new for old, whether the average be particular or general.

In no case shall Underwriters be liable for unrepaired damage in addition to a subsequent total loss sustained during the term covered by this Policy.

In ascertaining whether the Vessel is a constructive total loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the Vessel or wreck shall be taken into account.

In the event of total or constructive total loss, no claim to be made by the Underwriters for freight, whether notice of abandonment has been given or not.

Notwithstanding anything herein contained to the contrary this Policy is warranted free from particular average under 3 per cent., or unless amounting to $4,355, but nevertheless when the Vessel shall have been stranded, sunk, on fire, or in collision with any other Ship or Vessel, Underwriters shall pay the damage occasioned thereby, and the expense of sighting the bottom after stranding shall be paid, if reasonably incurred, even if no damage be found.

The warranty and conditions as to average under 3 per cent. to be applicable to each voyage as if separately insured, and a voyage shall be deemed to commence at one of the following periods to be selected by the Assured when making up the claim, viz.: at any time at which the Vessel (1) begins to load cargo or (2) sails in ballast to a loading port. Such voyage shall be deemed to continue during the ensuing period until either she has made one outward and one homeward passage (including an intermediate ballast passage, if made) or has carried and discharged two cargoes, whichever may first happen, and further, in either case, until she begins to load a subsequent cargo or sails in ballast for a loading port. When the Vessel sails in ballast to effect damage repair such sailing shall not be deemed to be a sailing for a loading port although she loads at the repairing port. In calculating the 3 per cent. above referred to, particular average occurring outside the period covered by this Policy may be added to particular average occurring within such period provided it occur upon the same voyage (as above defined), but only that portion of the claim arising within such period shall be recoverable hereon. The commencement of a voyage shall not be so fixed as to overlap another voyage on which a claim is made on this or the preceding Policy.

Should the Vessel at the expiration of this Policy be at sea, or in distress, or at a port of refuge or of call, she shall, provided previous notice be given to the Underwriters, be held covered at a pro rata monthly premium to her port of destination.

Should the Vessel be sold or transferred to other ownership, then, unless the Underwriters agree in writing to such sale or transfer, this Policy shall thereupon become cancelled from date of sale or transfer, unless the Vessel has cargo on board and has already sailed from her loading port, or is at sea in ballast, in either of which cases such cancellation shall be suspended until arrival at final port of discharge if with cargo, or at port of destination if in ballast. A pro rata daily return of premium shall be made.

It is warranted free of capture, seizure, arrest, restraint, or detainment, and the consequences thereof or of any attempt thereat (piracy excepted) and also from [illegible]

...ge under this ...ticular Average ...to ascertain ...

...ys after attachment this Policy may be canceled by the Assurers upon five days written notice being given the Assured. ...be had hereunder, unless the expense of recovering and repairing the vessel shall exceed the insured value.

Plaintiffs' Exhibit 6.

UNITED FRUIT COMPANY and/or ELDERS & FYFFES, LTD.

and/or the owning companies of the below mentioned vessels, its, or their successors and assigns.

FOR ACCOUNT OF WHOM IT MAY CONCERN.

LOSS, IF ANY, PAYABLE TO THE UNITED FRUIT COMPANY OR THEIR ORDER.

are by this instrument insured on the Body, Tackle and Apparel, Ordnance, Munitions, Artillery, Boats and other Furniture, Machinery, Refrigerating Machinery and Insulation, if any, Boilers, Fuel, Stores and Provisions and anything connected therewith of and in the Steamships named below, or by whatsoever other name or names the said steamship is or shall be called, lost or not lost, for and *during the space of twelve calendar months.*

AT AND FROM the 1st day of May, 1918.
UNTIL the 1st day of May, 1919.
} beginning and ending with noon Greenwich mean time.

At employment may other, in port and at sea, in docks and in or on dry docks, on marine railways, gridirons and pontoons, at all times, in all places and on all occasions, services and ports whatsoever and whensoever, using steam or sail; with leave to sail with or without pilots, TO TOW AND TO BE TOWED, and to assist vessels and/or craft in all situations and to any extent; to render salvage services, and to go into dock. With liberty to tranship, lighter, warp, and to take on board cargo, specie, passengers and stores, wherever the vessel may call at or proceed to, without being deemed a deviation, and with liberty to carry goods, live stock, etc., on deck or otherwise and liable for consequences to pollution of same if under cover. With leave to dock, undock, change docks as often as may be required, and to go in or on, and out of or off dry docks and on or off marine railways and/or gridirons and/or pontoons and/or to adjust compasses, and including all risks of every kind incidental to these operations.

THIS INSURANCE TO ATTACH AND COVER UPON THE STEAMERS NAMED AND FOR THE AMOUNT DESIGNATED UPON EACH IN THE FOLLOWING SCHEDULE AND FOR SO MUCH AS CONCERNS THE ASSURED, BY AGREEMENT BETWEEN THE ASSURED AND ASSURERS IN THIS POLICY EACH OF SAID STEAMERS SHALL BE VALUED AS SHOWN BELOW:

AMOUNT INSURED HEREUNDER	Vessel	Value	AMOUNT INSURED HEREUNDER	Vessel	Value
$30,555	Pastores	$1,018,500	Forward		
30,555	Tenadores	1,018,500	$14,234	San Jose	$474,450
31,555	Calamares	1,018,500	14,234	Esparta	474,450
	Heredia	633,610	14,234	Limon	474,450
	Parismina	633,610	12,652	Sarramacca	421,749
	Gortago	633,610	12,652	Coppename	421,749
18,978	Tivives	633,610	12,652	Suriname	421,749
18,978	Carrillo	633,610	15,015	Manzanares	587,170
18,978	Sixaola	633,610	15,024	Tortuguero	500,810
18,978	Turriabla	633,610	14,234	Reventazon	474,450
18,978	Abangarez	633,610	14,234	Barranca	474,450
18,978	Zacapa	633,610	13,048	Pacuare	434,925
18,978	Metapan	633,610	12,652	Matina	421,749
18,978	Atenas	633,610	2,910	Tacoronte	97,000
18,978	Almirante	633,610	1,746	Taoro	58,200
18,978	Santa Marta	633,610	1,746	Guanche	58,200
16,005	San Mateo	533,500	698	Aquila de Oro	23,280
15,000	Levisa	500,000			
			$480,210		

Touching the adventures and perils which we, the said assurers, are contented to bear and take upon us, they are of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Countermart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and Peoples, of what nation, condition or quality soever, Barratry of the Master and Mariners, and all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the said ships, etc., or any part thereof. And in case of any loss or misfortune it shall be lawful for the assured, their factors, servants and assigns, to sue, labor and travel for, in, and about the defense, safeguard and recovery of the said ship, etc., or any part thereof, without prejudice to this insurance to the charges whereof the said Insurance Company shall contribute according to the Rate and Quantity of the sum herein assured. And it is expressly declared and agreed that no acts of the assurer or insured in recovering, saving, or preserving the property insured shall be considered a waiver, or acceptance of abandonment; having been paid the consideration for this Insurance by the Assured or their Assigns at and after the rate of 3 per cent.

This Insurance also specially to cover, subject to the "Excess of $500 clause below" cost of repairs, and/or loss of or damage to Hull or Machinery through the negligence of Master, Mariners, Engineers or Pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the Machinery or Hull, or from explosions, risks, or other causes of whatsoever nature, arising either ex shore or otherwise, howsoever, causing loss of or injury to the property hereby insured, provided such loss or damage has not resulted from want of due diligence by the owners of the ship, or any of them, or by the Manager, and to cover all risks incidental to steam navigation, or in or on dry docks, and on marine railways, gridirons and pontoons.

Anything herein to the contrary notwithstanding this insurance is warranted free from all claims of whatsoever nature, including claims under the collision clause—other than Total Loss, and/or Constructive Total Loss, which shall be paid in full,—unless the aggregate of such claims, unreduced by any recoveries from other interests and/or parties, arising out of each separate accident exceeds $500 or $2,425, in which case this insurance shall be liable only for the amount by which such aggregate exceeds ($500 or $2,425. For the purpose of this insurance each accident shall be treated separately, but it is agreed that a sequence of damages arising directly or indirectly from the same peril shall be treated as one accident.

In case of any claim for average, the repairs to be paid without deduction of one-third, whether the average be particular or general.

In the event of this policy beginning or ending while the vessel is in course of a voyage, the underwriters agree to pay their proportion of loss or damage sustained while the policy is in force, provided the loss or damage sustained on the entire voyage would have been recoverable if the policy had covered such voyage in its entirety.

General Average and Salvage Charges payable in accordance with Bill of Lading conditions, and/or as per foreign custom, according to foreign statement, and/or York-Antwerp Rules, if required; and in the event of Salvage, towage, or other assistance being rendered to the vessel hereby insured by any vessel belonging in part or in whole to the same owners, it is hereby agreed that the value of such services (without regard to the common ownership of the vessels) shall be ascertained by Arbitration in the manner hereinafter provided for under the "Collision Clause," and the amount so awarded, as far as applicable to the interest hereby insured, shall constitute a charge under this Policy.

Warranted free from Capture, Seizure, and Detention, and the consequences of any attempt thereat, and all other consequences of hostilities (Piracy and Barratry excepted).

Held covered in the event of any breach of warranty, or deviation from the conditions of this Policy, at an equitable premium to be arranged, notice to be given on receipt of advices.

Privileged to comply with all Governmental and/or Naval instructions as to routes, ports of call and stoppages without prejudice to this insurance.

To RETURN 6 2/3c. net per cent. for every 15 consecutive days the vessel may be in Port or in Dock, during such period the vessel, being at the risk of the Underwriters, and having leave to dock, undock, and change docks, etc., and 10 2/3c. net per cent. for every 15 days of unexpired time, if this Insurance be cancelled, and arrival. A period in port falling between two insurances to be allowed for pro rata on each, Underwriters on each insurance agreeing to pay their pro rata proportion of such return.

It is also agreed that any change of interest in the vessel hereby insured shall not affect the validity of this policy.

In the event of total loss or constructive total loss, no claim to be made by the Underwriters for freight, whether notice of abandonment has been given or not.

In ascertaining whether the Vessel is a constructive total loss the insured values shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account.

Should the vessel at the expiration of this policy be at sea, or in distress, or at a port of refuge or of call, she shall be held covered until safely arrived at port of destination or until last at a pro rata daily premium if so desired by the insured.

COLLISION CLAUSE.

And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the assured and/or charterers shall in consequence thereof become liable to pay and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the ship hereby insured, we, the assurers, will pay the assured and/or charterers such proportion of such sum or sums so paid as our subscriptions hereto bear to the value of the ship hereby insured. And in cases where the liability of the ship has been contested, with the consent in writing of a majority of the underwriters on the hull and/or machinery (in amount), we will also pay a like proportion of the costs thereby incurred or paid; but when both vessels are to blame, then unless the liability of the owners and/or charterers of one or both of such vessels becomes limited by law, claims under the Collision Clause shall be settled on the principle of CROSS LIABILITIES as if the owners and/or Charterers of each vessel had been compelled to pay to the owners and/or charterers of the other of such vessels such one-half or other proportion of the latters damages as may have been properly allowed in ascertaining the balance or sum payable by or to the assured and/or charterers in consequence of such collision.

And it is further agreed that the principles involved in this clause shall apply to the case where both vessels are the property, in part or in whole, of the same owners and/or charterers, all questions of responsibility and amount of liability as between the two ships, being left to the decision of a single Arbitrator, if the parties can agree upon a single Arbitrator, or failing such agreement to the decision of Arbitrators, one to be appointed by the managing owners and/or charterers of both vessels, and one to be appointed by the majority in amount of Underwriters interested in each vessel; the two Arbitrators chosen to choose a third Arbitrator before entering upon the reference. The terms of the Arbitration Act of 1889 to apply to such reference, and the decision of such single, or of any two of such three Arbitrators, appointed as above, to be final and binding.

Provided always that this clause shall in no case extend to any sum which the Assured and/or charterers may become liable to pay, or shall pay for removal of obstructions under statutory powers, for injury to harbors, wharves, piers, stages and similar structures, consequent on such collision, or in respect of the Cargo or engagements of the insured Vessel, or for loss of life or personal injury.

This insurance is fully to indemnify the assured for any and all charges and expenses applicable to the vessel in respect of the perils insured hereunder, irrespective of the value of the vessel, and this policy shall pay its share of such charges and expenses in the proportion which the amount hereby insured bears to the value as declared herein.

It is agreed that the owners and/or managers are at liberty to insure Disbursements and/or other interests to any amount at their own absolute discretion: and the Underwriters hereby waive disclosure of the amounts so insured.

In the event of the vessel hereby insured being chartered and/or sub-chartered to the United Fruit Company, or any of its subsidiary companies, this insurance is to protect the charterers and/or sub-charterers in respect of the perils insured hereunder.

It is further understood and agreed that in the event of any of the within insured vessels being requisitioned by any Government under conditions whereby such government assumes the marine risks, the insurance in respect to said vessel shall be cancelled as and from the date of such requisition, and pro rata daily return of premium on the basis as hereinbefore provided for cancellation, shall be made thereon.

Anything in this policy to the contrary notwithstanding it is distinctly understood and agreed that this insurance is and shall in all matters pertaining thereto be treated as a separate and distinct contract in respect to each vessel insured hereunder.

It is hereby further specially understood and agreed that the terms and conditions of this printed form are to be regarded as substituted for the terms and conditions printed in the policy to which it is attached, the latter being hereby waived.

June 1st, 1918.

U. F. Co.
J. & E. No. 3—6,000-6-1918

ÆTNA INSURANCE CO. OF HARTFORD, CONN.
TALBOT, BIRD & CO. GENERAL AGENTS,
By

91

Where the Assured has paid or is liable for, any General Average contribution Policy shall be only in the proportion that the amount insured hereunder bears to the value for which these Assurers are liable, the amount of the Particular Average claim for which these Assurers are liable, the amount of the Particular Average claim what share of the contribution is recoverable from these Assurers; the extent of

and Detainments of all Kings, Princes and Peoples, of what nation, condition or quality soever, Barratry of the Master and Mariners, Explosions, Riots, or other causes of whatsoever nature arising either on shore or otherwise, causing Loss of or injury to the Property hereby insured, and of all other Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said Ship, &c., or any part thereof. And in case of any Loss or Misfortune, it shall be lawful for the Assured, their Factors, Servants and Assigns, to sue, labour and travel for, in and about the Defence, Safeguard and Recovery of the said Ship, &c., or any part thereof, without prejudice to this Insurance, to the Charges whereof the Assurers will contribute according to the Rate and Quantity of the sum herein assured. And it is expressly declared and agreed that no act of the Insurer or Insured in recovering, saving or preserving the property insured shall be considered as a waiver or acceptance of abandonment.

This Insurance also specially to cover (subject to the free of average warranty) loss of, or damage to hull or machinery, through the negligence of Master, Charterers, Mariners, Engineers, or Pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the Owners of the Ship, or any of them, or by the Manager. Masters, Mates, Engineers, Pilots, or Crew not to be considered as part owners within the meaning of this clause should they hold shares in the steamer.

And it is further agreed, that if the Ship hereby insured shall come into collision with any other Ship or Vessel, and the Assured or Charterers shall in consequence thereof become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the Ship hereby insured, we, the Assurers, will pay the Assured or Charterers such proportion of such sum or sums to be paid as our subscription hereto bear to the value of the Ship hereby insured. And in cases where the liability of the Ship has been contested with the consent in writing of a majority of the Underwriters on the hull and/or machinery (as aforesaid) we will also pay a like proportion of the costs thereby incurred or paid; but when both Vessels are to blame, then, unless the liability of the Owners or Charterers of one or both of such Vessels becomes limited by law, claims under the Collision Clause shall be settled on the principle of CROSS-LIABILITY as if the Owners or Charterers of each Vessel had been compelled to pay to the Owners or Charterers of the other of such Vessels such sum or sums as may be the proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the Assured or Charterers in consequence of such collision; and it is further agreed that the principles involved in this clause shall apply to the cases where both Vessels are the property, in part or in whole, of the same Owners or Charterers, all questions of responsibility and extent of liability as between the two Ships being left to the decision of a single Arbitrator, if the parties can agree upon a single Arbitrator, or failing such agreement, to the decision of Arbitrators, one to be appointed by the Managing Owner(s) or Charterers of both Vessels, and one to be appointed by the majority (in amount) of Underwriters interested in such Vessels; the two Arbitrators chosen to choose a third Arbitrator before entering upon the reference, and the decision of such single, or of any

part. When the Vessel fails in ballast to effect damage repair such sailing shall not be deemed to be a sailing for a loading port although she loads at the repairing port. In calculating the 3 per cent. above referred to, particular average occurring outside the period covered by this Policy may be added to particular average occurring within such period provided it occur upon the same voyage (as above defined), but only that portion of the claim arising within such period shall be recoverable hereon. The commencement of a voyage shall not be so fixed as to overlap another voyage on which a claim is made on this or the preceding Policy.

Should the Vessel at the expiration of this Policy be at sea, or in distress, or at a port of refuge or of call, she shall, provided previous notice be given to the Underwriters, be held covered at a pro rata monthly premium to her port of destination.

Should the Vessel be sold or transferred to other ownership, then, unless the Underwriters agree in writing to such sale or transfer, this Policy shall thereupon become cancelled from date of sale or transfer, unless the Vessel has cargo on board and has already sailed from her loading port, or is at sea in ballast, in either of which cases such cancellation shall be suspended until arrival at final port of discharge if with cargo, or at port of destination if in ballast. A pro rata daily return of premium shall be made.

It is warranted free of capture, seizure, arrest, restraint, or detainment, and the consequences thereof or of any attempt thereat (piracy excepted) and also from all consequences of hostilities or war-like operations, whether before or after declaration of war.

TO RETURN { As per ... for each uncommenced month if it is mutually agreed to cancel this Policy. / per ... per cent. for each consecutive ... day. } and arrival.
the Vessel may be laid up in port:—

A period in part falling between two insurances to be allowed pro rata on each, underwriters on each insurance agreeing to pay their pro rata proportion of the Return due.

In the event of accident whereby loss or damage may result in a claim under this Policy, notice shall be given to the Assurers, where practicable, prior to survey, so that they may appoint their own surveyor if they so desire; and whenever the extent of the damage is ascertainable, the majority (in amount) of the Underwriters may take or may require the Assured to take tenders for the repair of such damage. In cases where a tender is accepted by or with the approval of Underwriters, the Underwriters will make an allowance at the rate of 30 per cent. per annum on the insured value for the time actually lost in waiting for tenders. In the event of the Assured failing to comply with the conditions of this clause 5 per cent. shall be deducted from the amount of the ascertained claim.

Held covered in case of any breach of warranty as to cargo, trade, locality, or date of sailing, provided notice be given, and any additional premium required be agreed immediately after receipt of advices of breach or proposed breach by Owners.

In event of non-payment of premium thirty days after attachment this Policy No recovery for a constructive Total Loss shall be had hereunder, unless the

In Witness Whereof, the said ÆTNA INSURANCE COMPANY has caused this Policy to be signed by its President, and attested by its Marine Secretary, at its office in the CITY OF HARTFORD and State of Connecticut, and this Policy is made and accepted upon the above expressed conditions, but shall not be valid unless countersigned by TALBOT, BIRD & CO., INC., General Agents of the Company at NEW YORK CITY.

W. E. Whittelsey
Marine Secretary

Chas. J. Clark
President

Countersigned at *NEW YORK CITY*, this 1st day of June, *A. D. 191 8*.

ÆTNA INSURANCE CO., HARTFORD, CONN.
TALBOT, BIRD & CO., INC., GENERAL AGENTS,
General Agents

By

Plaintiffs' Exhibit 6.

Original.

AMERICAN HULL POLICY

Aetna
Insurance Company
Hartford, Connecticut

No. 6315

Various

United Fruit Company et al

$ 485,215 @ 3 per cent. $ 14556.45

JOHNSON & HIGGINS,
61 WALL STREET, NEW YORK.
Entry Number 32103
Examined by [redacted]

Plaintiffs' Exhibit 7.

AMERICAN HULL POLICY 1916 FORM

No. Y5285

Boston Insurance Company

BY THIS POLICY OF INSURANCE

DO MAKE INSURANCE and cause United Fruit Company and/or Elders & Fyffes, Ltd.

PRINTED
RATE
L 170

AMOUNT INSURED

(Beginning and ending with Greenwich Mean Time).

$ 404344

But Warranted as follows:— see form attached

Upon the body, tackle, apparel, stores, ordnance, munitions, artillery, boats, and other furniture, boilers and machinery of the Steamship called the all form S. S. or by whatsoever name or names the said vessel is or shall be named or called; beginning the adventure upon the said Vessel, &c., as above, and so shall continue and endure during the period aforesaid, as employment may offer, in port and at sea, in docks and graving docks, and on ways, gridirons and pontoons, at all times, in all places, and on all occasions, services and trades whatsoever and wheresoever, under steam or sail; with leave to sail with or without pilots, to tow and be towed, and to assist vessels and/or craft in all situations and to any extent, and to go on trial trips. With liberty to discharge, exchange and take on board goods, specie, passengers, and stores, wherever the Vessel may call at or proceed to, and with liberty to carry goods, live cattle, &c., on deck or otherwise, but warranted free of any claim in respect of deck cargo. Including all risks of docking, undocking, changing docks, or moving in harbours and going on or off gridiron or graving docks as often as may be done during the currency of this Policy.

The said Ship, &c., for so much as concerns the Assured, by agreement between the Assured and Assurers in this Policy, are and shall be valued at as follows:

Hull, tackle, apparel, furniture, &c. ..... $ .....

Boilers, machinery, &c., and everything connected therewith ..... $ ..... $ .....

Donkey boilers, winches, cranes, windlasses, steering gear, and electric light apparatus, shall be deemed to be part of the hull and not part of the machinery. Refrigerating machinery and insulation appertaining thereto not covered unless expressly included in this Policy, or unless the property of the owners of the Vessel.

THE INSURERS to be paid in consideration of this insurance ..... Dollars,

being at the rate of ..... per cent.

RATE 3 %

Warranted that the amount insured for account of the Assured and/or their managers on Disbursements, Commissions, or similar interests, "policy proof of interest" or "full interest admitted." or on excess or increased value of Hull or Machinery however described shall not, except as indicated below, exceed 15% of the insured valuation of the Vessel, but the Assured may in addition thereto effect "policy proof of interest" or "full interest admitted" insurance on any of the following interests:

Premiums (reducing or not reducing monthly) to any amount actually at risk, and

Freight and/or Chartered Freight and/or Anticipated Freight and/or Earnings and/or Hire or Profits on Time Charter and/or Charter for series of voyages for any amount not exceeding in the aggregate 25% of the insured valuation of the Vessel; and if the actual amount at risk on any or all of such interests shall exceed such 25% of the insured valuation of the Vessel, the Assured and/or their managers may, without prejudice to this warranty, insure whilst at risk the excess of such interests reducing as earned.

Provided always that a breach of this warranty shall not afford underwriters any defence to a claim by mortgagees or other third parties who may have accepted this policy without notice of such breach of warranty, nor shall it restrict the right of the Assured and/or their managers to insure in addition General Average and/or Salvage Disbursements whilst at risk.

PREMIUM $ 1213.32

TOUCHING THE ADVENTURES AND PERILS which we, the said Assurers, are contented to bear and take upon us, they are of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Counter-Mart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and Peoples, of what nation, condition or quality soever, Barratry of the Master and Mariners, Explosions, Riots, or other causes of whatsoever nature arising either on shore or otherwise, causing Loss of or injury to the Property hereby insured, and of all other Perils, Losses, and Misfortunes that have or shall come to the Hurt, Detriment, or Damage of the said Ship, &c., or any part thereof. And in case of any Loss or Misfortune, it shall be lawful for the Assured, their Factors, Servants, and Assigns, to sue, labour, and travel for, in, and about the Defence, Safeguard, and Recovery of the said ship, &c., or any part thereof, without prejudice to this Insurance to the Charges whereof the Assurers will contribute according to the Rate and Quantity of the sum herein assured. And it is expressly declared and agreed that no act of the Insurer or Insured in recovering, saving or preserving the property insured shall be considered as a waiver or acceptance of abandonment.

THIS INSURANCE ALSO SPECIALLY TO COVER (SUBJECT TO THE FREE OF AVERAGE WARRANTY) LOSS OF, OR DAMAGE TO HULL OR MACHINERY, THROUGH THE NEGLIGENCE of Master, Charterers, Mariners, Engineers, or Pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the Owners of the Ship, or any of them, or by the Manager. Masters, Mates, Engineers, Pilots, or Crew not to be considered as part owners within the meaning of this clause should they hold shares in the steamer.

And it is further agreed, that IF THE SHIP HEREBY INSURED SHALL COME INTO COLLISION with any other Ship or Vessel, and the Assured or Charterers shall in consequence thereof become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the Ship hereby Insured, we, the Assurers, will pay the Assured or Charterers such proportion of such sum or sums so paid as our subscriptions hereto bear to the value of the Ship hereby Insured. And in cases where the liability of the Ship has been contested with the consent in writing of a majority of the Underwriters on the hull and/or machinery (in amount) we will also pay a like proportion of the costs thereby incurred or paid; but where both Vessels are to blame, then unless the liability of the Owners or Charterers of one or both of such Vessels becomes limited by law, claims under the Collision Clause shall be settled on the principle of CROSS-LIABILITIES as if the Owners or Charterers of each Vessel had been compelled to pay to the Owners or Charterers of the other of such Vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the Assured or Charterers in consequence of such collision; and it is further agreed that the principles involved in this clause shall apply to the case where both Vessels are the property, in part or in whole, of the same Owners or Charterers, all questions of responsibility and amount of liability as between the two ships being left to the decision of a single Arbitrator, if the parties can agree upon a single Arbitrator, or failing such agreement, to the decision of Arbitrators, one to be appointed by the Managing Owner or Charterers of both Vessels, and one to be appointed by the majority (in amount) of Underwriters interested in each Vessel; the two Arbitrators chosen to choose a third Arbitrator before entering upon the reference, and the decision of such single, or of any two of such three Arbitrators, appointed as above to be final and binding. PROVIDED ALWAYS that this clause shall in no case extend to any sum which the Assured or Charterers may become liable to pay, or shall pay for removal of obstructions under statutory powers, for injury to harbours, wharves, piers, stages, and similar structures, consequent on such collision, or in respect of the cargo or engagements of the Insured Vessel, or for loss of life, or personal injury. And provided also that in the event of any claim being made by Charterers under this clause they shall not be entitled to recover in respect of any liability to which the Owners of the Ship, if interested in this Policy at the time of the Collision in question, would not be subject, nor to a greater extent than the shipowners would be entitled in such event to recover.

And it is further agreed that in the event of salvage, towage, or other assistance being rendered to the Vessel hereby insured by any Vessel belonging in part or in whole to the same Owners or Charterers, the value of such services (without regard to the common ownership of the Vessels) shall be ascertained by arbitration in the manner above provided for under the Collision Clause, and the amount so awarded, so far as applicable to the interest hereby insured shall constitute a charge under this Policy.

GENERAL AVERAGE AND SALVAGE CHARGES PAYABLE in accordance with York-Antwerp Rules, 1890, if so provided for in the contract of affreightment. As regards matters not provided for in the York-Antwerp Rules, 1890 (when the contract of affreightment provided for such rules), and also when the contract of affreightment does not provide for such rules, General Average and salvage charges shall be payable in accordance with the laws and usages of the United States. Provided always that when an adjustment according to the laws and usages of the port of destination is properly demanded by the owners of the cargo, General Average shall be paid in accordance with same.

No claim shall be allowed in respect of scraping or painting the Vessel's bottom except as provided in Rule of Practice VIII of the Association of Average Adjusters of the United States.

Grounding in the Panama Canal or in the Suez Canal or in the Manchester Ship Canal or its connections, or in the River Mersey above Rock Ferry Slip, or in the River Plate (above Buenos Aires) or its tributaries, or in the Danube, Demerara, or Bilbao River or on the Yenikale or Kilitsch Bar, shall not be deemed a stranding.

AVERAGE PAYABLE ON EACH VALUATION separately or on the whole, without deduction of thirds, new for old, whether the average be particular or general.

In no case shall Underwriters be liable for unrepaired damage in addition to a subsequent total loss sustained during the term covered by this Policy.

IN ASCERTAINING WHETHER THE VESSEL IS A CONSTRUCTIVE TOTAL LOSS the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the Vessel or wreck shall be taken into account.

In the event of total or constructive total loss, no claim to be made by the Assured for freight (whether chartered or insured separately or not) unless the same shall have been earned and the Vessel hereby insured shall not be abandoned for freight.

In the event of any damage, loss or misfortune happening to the Vessel hereby insured, whereby any claim shall be made on this Policy, the Assured shall not be bound to prove interest or to abandon the Vessel or any property insured hereby, but the Assurers shall be liable for the loss, damage or misfortune, unless the expense of the Assured in endeavouring to save, preserve or recover the Vessel or property insured shall exceed the insured value.

INSURANCE CO.

9J528

Plaintiffs' Exhibit 7.

UNITED FRUIT COMPANY and/or ELDERS & FYFFES, LTD.

and/or the owning companies of the below mentioned vessels, its, or their successors and assigns.

FOR ACCOUNT OF WHOM IT MAY CONCERN.

LOSS, IF ANY, PAYABLE TO THE UNITED FRUIT COMPANY OR THEIR ORDER.

are by this instrument insured on the Body, Tackle and Apparel, Ordnance, Munitions, Artillery, Boats and other Furniture, Machinery, Refrigerating Machinery and Insulation, if any, Boilers, Fuel, Stores and Provisions and anything connected therewith of and in the Steamships named below, or by whatsoever other name or names the said steamship is or shall be called, lost or not lost, for and *during the space of twelve calendar months.*

AT AND FROM the 1st day May, 1928.
UNTIL the 1st day of ... } beginning and ending with noon Greenwich mean time.

At and from any other, in port and at ... ports and in or on dry docks, on marine railways, gridirons and pontoons, at all times, ... whatsoever and whatsoever, under steam or sail, with leave to ... and to call at ... or ports in all situations and to any extent; ... and to take on board goods, specie, ... with liberty to ... a deviation, and with liberty for ... to assist and tow vessels in distress, and for ... if under cover. With leave to ... and put out of or off dry docks and on or off marine ... and including all risks of every kind incidental to these ...

THE UNDERWRITERS TO ATTACH AND COVER UPON THE STEAMERS NAMED AND FOR THE AMOUNT DESIGNATED HEREIN, BUT THE FOLLOWING AMOUNTS, AND FOR SO MUCH AS CONCERNS THE ASSURED, BY AGREEMENT AMONGST THE ASSURED AND ASSURERS IN THIS POLICY EACH OF SAID STEAMERS SHALL BE VALUED AS SHOWN BELOW:

AMOUNT INSURED HEREUNDER	Vessel	Value	AMOUNT INSURED HEREUNDER	Vessel	Value
	Pastores	$1,018,500	Forward		
	Tenadores	1,018,500		San Jose	$474,450
	Calamares	1,018,500		Esparta	474,450
	Morodio	[illegible]		Limon	474,450
	Peninsino	[illegible]		Sarramacca	421,740
	Castago	[illegible]		Coppename	421,470
	Tivives	632,610		Suriname	421,470
	Carrillo	632,610		Manzanares	527,170
	Sixaola	632,610		Tortuguero	500,810
	Turrialba	632,610		Reventazon	474,450
	Ahaggarez	632,610		Barranca	474,450
	Zacapa	632,610		Pacuare	434,925
	Metapan	632,610		Matina	421,742
	Atenas	632,610		Tacoronte	97,000
	Almirante	632,610		Taoro	58,200
	Santa Marta	632,610		Guanche	58,200
	San Mateo	533,500		Aquila de Oro	23,280
	Levisa	500,000			

Touching the adventures and perils which we, the said assurers, are contented to bear and take upon us, they are of the ... Arrest, Restraints and Detainments of Kings, Princes and People, of what nation, condition or quality soever, Barratry ... and all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage ... or any part thereof. And in case of any loss or misfortune it shall be lawful for the assured, their ... and assigns, to sue, labour and travel for, in and about the defense, safeguard and recovery of the said ship, etc., ... thereof, or any part thereof, without prejudice to this insurance; to the charges whereof the said Insurance Company will contribute ... proportion of the sum hereby assured. And it is expressly declared and agreed that no acts of the ... or them, shall in any case be construed a waiver, or preventing the assured, their executors, administrators or assigns, ... but it is agreed that a sequence of ... shall be treated separately, but it is agreed that a sequence of ... by the Assured or ... Assigns at and after the rate of ... per cent.

This insurance also specially to cover, subject to the "Seizure of 1899 clause below" cost of repairs, and/or loss of or damage to hull or machinery caused by the negligence of Master, Mariners, Engineers, or Pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the Machinery or Hull, or from explosions, riots, or other causes of whatsoever nature, whether arising from or otherwise, happening, causing loss of or injury to the property hereby insured, ... and to cover all risks incidental to steam navigation, or in or on dry docks, and on marine railways, gridirons and pontoons.

Anything herein to the contrary notwithstanding this insurance is warranted free from all claims of whatsoever nature, ... under the following clauses: other than Total Loss, and/or Constructive Total Loss, which shall be paid in full— ... Particular Average of each vessel separately considered, if any recoverable from other interests and/or parties, arising out of each separate ... shall be liable only for the amount by which such aggregate exceeds ... Each accident and/or series of accidents arising directly or indirectly from the same peril shall be treated separately, but it is agreed that a sequence of ... shall be treated as one accident.

In case of any claim for average, the regular to be paid without deduction of one-third, whether the average be particular or general.

In the event of this policy terminating or ending while the vessel is in course of a voyage, the underwriters agree to pay ... of this policy during such time as the policy is in force, provided the loss or damage sustained on the entire ... insured hereunder, if the policy had covered such voyage, is not entirety.

General Average and Salvage Charges payable in accordance with Bill of Lading conditions, and/or as per foreign custom, ... to be adjusted according to the contract of affreightment, if required, and in the event of default, towards ... or other assurance ... the value of such vessel (without regard to the insurance hereon) shall be ascertained by Arbitration in ... manner hereinafter provided for under the "Collision Clause," and the amount so awarded, so far as applicable to the interest ... hereby insured, shall constitute a charge under this Policy.

Warranted free from Capture, Seizure, and Detention, and the consequences of any attempt thereat, and all other consequences of hostilities (Piracy and Barratry excepted).

Held covered in the event of any breach of warranty, or deviation from the conditions of this Policy, at an equitable premium to be arranged, notice to be given on receipt of advices.

Privileged to comply with all Governmental and/or Naval instructions as to routes, ports of call and stoppages without prejudice to this insurance.

To RETURN ... per cent. for every 15 consecutive days the vessel may be in Port or in Dock, during such ... the vessel ... at the risk of the Underwriters, and having leave to dock, undock, and change docks, etc., and ... 12 hr. ... intervals to be allowed for pro rata on each Underwriter on each insurance agreeing to pay their pro rata proportion of ... both ports.

It is also agreed that any change of interest in the vessel hereby insured shall not affect the validity of this policy.

In the event of total loss or constructive total loss, no claim to be made by the Underwriters for freight, whether notice of ... has been given or not.

In ascertaining whether the Vessel is a constructive total loss the insured value shall be taken as the repaired value, and ... in respect of the damaged or break-up value of the vessel or wreck shall be taken into account.

Should the vessel at the expiration of this policy be at sea, or in distress, or at a port of refuge or of call, she shall be ... deemed upon safely arrived at port of destination or until lost or a pro rata daily premium if so desired by the insured.

COLLISION CLAUSE.

And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the ... assured shall in consequence of such collision become liable to pay and shall pay by way of damages to any other person ... any sum or sums not exceeding in respect of any one such collision the value of the ship insured hereunder, ... and if any ... insured ... thereby incurred, we, the ... will pay to the assured ... such proportion of such sum or sums so paid as our subscription hereto ... to the value of the ship hereby insured. And in case where the liability of the ship has been contested, with leave ... hereto ... such liability, we, the ... will also contribute to the costs and/or expenditure (in amount) ... we will also pay a like proportion of ... or both of such vessels becoming limited by law, always under the Collision Clause shall be notified on the principle of CROSS LIABILITY as if the owners and/or Charterers of each vessel had been compelled to pay to the owners and/or charterers of the ... owners of such vessel, such sum or sums representing of the latter's damages as may have been properly allowed in ascertaining the balance or sums payable by or to the assured and/or charterers in consequence of such collision.

And it is further agreed that the principles involved in this clause shall apply to the case where both vessels are the property, in part or in whole, of the same owners and/or charterers, all questions of responsibility and amount of liability as between the two vessels being left to the decision of a single Arbitrator, if the parties can agree upon a single Arbitrator, failing such ... to be appointed by the judge in command of the vessel to be represented by the owners and/or charterers of both vessels, and ... to ... by the judge of a Court of Competent Jurisdiction at the port to which either vessel may be taken; the two Arbitrators chosen to choose a third ... before entering upon the reference. The terms of the Arbitration Act of 1889 to apply to such reference, and the decision of such ... or of any two of such three Arbitrators, appointed as above, to be final and binding.

Provided always that this clause shall in no case extend to any sum which the Assured and/or charterers may become liable to pay, or shall pay for removal of obstructions under statutory powers, for injury to harbors, wharves, piers, stages and similar ... compulsory or such collision, or in respect of the Cargo or engagements of the insured Vessel, or for loss of life or personal injury.

This insurance is fully to indemnify the assured by any and all charges and expenses applicable to the vessel in respect of the ... insured hereunder, irrespective of the value of the vessel, and the assured shall pay his share of such charges and expenses ... the proportion which the amount hereby insured bears to the value as declared herein.

It is agreed that the owners and/or managers are at liberty to insure Disbursements and/or other interests to any amount ... their own absolute discretion: and the Underwriters hereby waive disclosure of the amounts so insured.

In the event of the vessel hereby insured being chartered and/or sub-chartered to the United Fruit Company, or any of its ... companies, this insurance is to protect the charterers and/or sub-charterers in respect of the perils insured hereunder.

It is further understood and agreed that in the event of any of the within insured vessels being requisitioned by any Government ... under the provisions of any ... governmental ... of the marine risks, the insurance in respect to said vessel shall be cancelled ... and from the date of such requisition, and pro rata daily return of premium on the basis as hereinbefore provided for cancellation, shall be made thereon.

Anything in this policy to the contrary notwithstanding it is distinctly understood and agreed that this insurance is and shall ... all matters pertaining thereto be treated as a separate and distinct contract in respect to each vessel insured hereunder.

It is hereby further specially understood and agreed that the terms and conditions of this printed form are to be regarded ... as substituted for the terms and conditions printed in the policy to which it is attached, the latter being hereby waived.

May xx 192 8

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AMERICAN HULL POLICY 1916 FORM
Sept. 1, 1917 Edition.

Plaintiffs' Exhibit 8.

No. 861

The Thames & Mersey Marine Insurance Company, Limited,

UNITED STATES BRANCH, 27 William Street, New York,

INSURING $ 161,739.- DOLLARS OF THE AMOUNT COVERED BY THIS POLICY

AND

The Union Marine Insurance Company, Limited,

UNITED STATES BRANCH, 27 William Street, New York,

INSURING $ 161,739.- DOLLARS OF THE AMOUNT COVERED BY THIS POLICY.

UNITED FRUIT COMPANY AND/OR ELDERS AND FYFFES, LIMITED *For account of* Whom it may concern

Loss, if any, payable to as per form attached

Do make insurance and cause. themselves

To be insured, lost or not lost, to the amount of THREE HUNDRED TWENTY THREE THOUSAND FOUR HUNDRED SEVENTY EIGHT *Dollars*

Amount Insured. $ 323,478.-

At and from the As per form attached *Day of* 19

Until the *Day of* 19

(Beginning and ending with Greenwich Mean Time).

But Warranted as follows:— As per form attached

FORM ATTACHED DULY PAID THIS [illegible]

Upon the hull, tackle, apparel, stores, ordnance, munitions, artillery, boats, and other furniture, boilers and machinery of the Steamship As attached called the S.S. or by whatsoever name or names the said Vessel is or shall be named or called; beginning the adventure upon the said Vessel, &c., as above, and so shall continue and endure during the period aforesaid, as employment may offer, in port and at sea, in docks and graving docks, and on ways, gridirons and pontoons, at all times, in all places, and on all occasions, services and trades whatsoever and wheresoever, under steam or sail; with leave to sail with or without pilots, to tow and be towed, and to assist vessels and/or craft in all situations and to any extent, and to go on trial trips. With liberty to discharge, exchange and take on board goods, specie, passengers, and stores, wherever the Vessel may call at or proceed to, and with liberty to carry goods, live cattle, &c., on deck or otherwise, but warranted free of any claim in respect of deck cargo. Including all risks of docking, undocking, changing docks, or moving in harbor and going on or off gridiron or graving docks as often as may be done during the currency of this Policy.

The said Ship, &c., for so much as concerns the Assured, by agreement between the Assured and Assurers in this Policy, are and shall be valued at as follows:

Hull, Tackle, apparel, furniture, &c. $

Boilers, machinery, &c., and everything connected therewith $ } $ as attached

Donkey boilers, winches, cranes, windlasses, steering gear, and electric light apparatus, shall be deemed to be part of the hull and not part of the machinery. Refrigerating machinery and insulation appertaining thereto not covered unless expressly included in this Policy, or unless the property of the owners of the Vessel.

Rate - 3 -

The Assurers to be paid in consideration of this insurance three - - Wine thousand seven hundred four and 34/100ths Dollars, being at the rate of per cent.

Premium $ 9,704.34

Warranted that the amount insured for account of the Assured and or their managers on Disbursements, Commissions or similar interests, "policy proof of interest" or "full interest admitted," or on excess or increased value of Hull or Machinery however described, shall not, except as indicated below, exceed 15% of the insured valuation of the Vessel, but the assured may in addition thereto effect "policy proof of interest" or "full interest admitted" insurance on any of the following interests:"

Premiums (reducing or not reducing monthly) to any amount actually at risk, and

Freight and/or Chartered Freight and/or Anticipated Freight and/or Earnings and/or Hire or Profits on Time Charter and/or Charter for series of voyages for any amount not exceeding in the aggregate 15% of the insured valuation of the Vessel; and if the actual amount at risk on any or all of such interests shall exceed such 15% of the insured valuation of the Vessel, the Assured and or their managers may, without prejudice to this warranty, insure whilst at risk the excess of such interests reducing as earned.

Provided always that a breach of this warranty shall not afford underwriters any defense to a claim by mortgagees or other third parties who may have accepted this policy without notice of such breach of warranty, nor shall it restrict the right of the Assured and/or their managers to insure in addition General Average and/or Salvage Disbursements whilst at risk.

Touching the Adventures and Perils which we, the said Assurers, are contented to bear and take upon us, they are of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Counter-Mart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and Peoples, of what nation, condition or quality soever, Barratry of the Master and Mariners, Explosions, Riots, or other causes of whatsoever nature arising either on shore or otherwise, causing Loss of or injury to the Property hereby insured, and of all other Perils, Losses, and Misfortunes that have or shall come to the Hurt, Detriment, or Damage of the said Ship, &c., or any part thereof. And in case of any Loss or Misfortune, it shall be lawful for the Assured, their Factors, Servants, and Assigns, to sue, labor, and travel for, in, and about the Defence, Safeguard, and Recovery of the said Ship, &c., or any part thereof, without prejudice to this Insurance, to the Charges whereof the Assurers will contribute according to the Rate and Quantity of the sum herein assured. And it is expressly declared and agreed that no act of the Insurer or Insured in recovering, saving or preserving the property insured shall be considered as a waiver or acceptance of abandonment.

This Insurance also specially to cover (subject to the free of average warranty) loss of, or damage to hull or machinery, through the negligence of Master, Charterers, Mariners, Engineers, or Pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the Owners of the Ship, or any of them, or by the Manager. Masters, Mates, Engineers, Pilots, or Crew not to be considered as part owners within the meaning of this clause should they hold shares in the steamer.

And it is further agreed, that if the Ship hereby insured shall come into collision with any other Ship or Vessel, and the Assured or Charterers shall in consequence thereof become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the Ship hereby insured, we, the Assurers, will pay the Assured or Charterers such proportion of such sum or sums so paid as our subscriptions hereto bear to the value of the Ship hereby insured. And in case where the liability of the aforesaid has been contested with the consent in writing of a majority of the Underwriters on the same, the Assurers (in proportion as aforesaid) will also pay the Assured or Charterers such proportion of [illegible] as aforesaid. And it is further agreed that the Collision Clause shall be settled on the principles of cross-liabilities, as if the Owners or Charterers of each Vessel had been compelled to pay to the Owners or Charterers of the other Vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the Assured or Charterers in consequence of such collision; and it is further agreed that the principles involved in this clause shall apply to the case where both Vessels are the property, in part or in whole, of the same Owners or Charterers, all questions of responsibility and amount of liability as between the two Ships being left to the decision of a single Arbitrator, if the parties can agree upon a single Arbitrator, or failing such agreement, to the decision of Arbitrators, one to be appointed by the Managing Owners or Charterers of both Vessels, and one to be appointed by the majority (in amount) of Underwriters interested in each Vessel; the two Arbitrators chosen to choose a third Arbitrator before entering upon the reference and the decision of such single, or of any two of such three Arbitrators, appointed as above to be final and binding. Providing always that this clause shall in no case extend to any sum which the Assured or Charterers may become liable to pay, or shall pay for removal of obstructions under statutory powers, for injury to harbors, wharves, piers, stages, and similar structures, consequent on such collision, or in respect of the cargo or engagements of the Insured Vessel, or for loss of life, or personal injury. And provided also that in the event of any claim being made by Charterers under this clause they shall not be entitled to recover in respect of any liability to which the owners of the Ship, if interested in this Policy at the time of the Collision in question, would not be subject nor to a greater extent than the Shipowners would be entitled in such event to recover.

And it is further agreed that in the event of salvage, towage, or other assistance being rendered to the Vessel hereby insured by any Vessel belonging in part or in whole to the same Owners or Charterers, the value of such services (without regard to the common ownership of the Vessels) shall be ascertained by arbitration in the manner above provided for under the Collision Clause, and the amount so awarded as far as applicable to the interest hereby insured shall constitute a charge under this Policy.

General Average and salvage charges payable in accordance with York-Antwerp Rules, 1890, if so provided for in the contract of affreightment. As regards matters not provided for in the York-Antwerp Rules, [illegible] the contract of affreightment provides for such rules), and also when the contract of affreightment does not provide for such rules, General Average and salvage charges shall be payable in accordance with the laws and usages of the United States. Provided always that when an adjustment according to the laws and usages of the port of destination is properly demanded by the owners of the cargo, General Average shall be paid in accordance with same.

No claim shall be allowed in respect of scraping or painting the Vessel's bottom except as provided in Rule of Practice VIII of the Association of Average Adjusters of the United States.

Grounding in the Panama Canal or in the Suez Canal or in the Manchester Ship Canal or its connections, or in the River Mersey above Rock Ferry Slip, or in the River Plate (above Buenos Aires) or its tributaries, or in the Danube, Demerara, or Bilbao River, or on the Yenisale or Lifasa Bar, shall not be deemed to be a stranding.

Average payable on each valuation separately or on the whole, without deduction of thirds, new for old, whether the average be particular or general.

In no case shall Underwriters be liable for unrepaired damage in addition to a consequent total loss sustained during the term covered by this Policy.

In ascertaining whether the Vessel is a constructive total loss, both the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the Vessel or wreck shall be taken into account.

In the event of total or constructive total loss, notice to be made by the Underwriters for freight, whether notice of abandonment has been given or not.

Notwithstanding anything herein contained to the contrary this Policy is warranted free from particular average under 3 per cent., or [illegible] shall have been stranded, sunk, on fire, or in collision with any other ship or

1. Where the Assured has paid, or is liable for, General Average contribution and the contributory value is greater than the amount recoverable under this policy, he shall be entitled to recover in the proportion that the amount insured hereby bears to the contributory value.
2. Where the contributory value has been reduced by a deduction from the Assurers' liability in order to ascertain the amount recoverable under this policy, the deduction shall be deducted from the amount insured under this policy in order to ascertain the amount recoverable from the Assurers; the extent of the liability of the Assurers for salvage shall be computed in like manner.
3. In event of abandonment of premium thirty days after attachment this policy may be cancelled by the Assurers upon notice being given to the assured.
4. No recovery for a Constructive Total Loss shall be had hereunder, unless the expense of recovering and repairing the vessel the insured value.

Plaintiffs' Exhibit 7.

No: 75785

AMERICAN HULL
1916 FORM

Various Vessels

Boston Insurance Company

INSURED

United Fruit Co & /or etc

Amount Insured $ 404 344

Rate, 3 % Premium, $ 12130 32

Expires May 1 1919 noon

NEW YORK OFFICE
66 BEAVER STREET

DIRECTED BY
JOHNSON & HIGGINS
Entered 7328
Examined
49 & 51 WALL ST., N. Y.

92b

...ended and discharged two months, whichever may first happen, and further, in either case, until she begins to load a subsequent cargo or sails in ballast for a loading port. When the Vessel sails in ballast to effect damage repair such sailing shall not be deemed to be a sailing for a loading port although she loads at the repairing port. In calculating the 3 per cent. above referred to, particular average occurring outside the period covered by this Policy may be added to particular average occurring within such period provided it occur upon the same voyage (as above defined), but only that portion of the claim arising within such period shall be recoverable hereon. The commencement of a voyage shall not be so fixed as to overlap another voyage on which a claim is made on this or the preceding Policy.

SHOULD THE VESSEL AT THE EXPIRATION OF THIS POLICY BE AT SEA, or in distress, or at a port of refuge or of call, she shall, provided previous notice be given to the Underwriters, be held covered at a pro rata monthly premium to her port of destination.

SHOULD THE VESSEL BE SOLD OR TRANSFERRED TO OTHER OWNERSHIP, then, unless the Underwriters agree in writing to such sale or transfer, this Policy shall thereupon become cancelled from date of sale or transfer, unless the Vessel has cargo on board and has already sailed from her loading port, or is at sea in ballast, in either of which cases such cancellation shall be suspended until arrival at final port of discharge if with cargo, or at port of destination if in ballast. A pro rata daily return of premium shall be made.

WARRANTED FREE OF CAPTURE, SEIZURE, ARREST, RESTRAINT, OR DETAINMENT, AND THE CONSEQUENCES THEREOF or any attempt thereat (piracy excepted) and ALSO FROM ALL CONSEQUENCES OF HOSTILITIES OR WAR-LIKE OPERATIONS, whether before or after declaration of war.

TO RETURN { ..... per cent. for each uncommenced month if it be mutually agreed to cancel this Policy. / ..... per cent. for each consecutive ..... days the Vessel may be laid up in port:— } and arrival.

A period in port falling between two insurances to be allowed pro rata on cash, underwriters on each insurance agreeing to pay their pro rata proportion of the Return due.

IN THE EVENT OF ACCIDENT whereby loss or damage may result in a claim under this Policy, NOTICE SHALL BE GIVEN TO THE UNDERWRITERS, where practicable, prior to survey, so that they may APPOINT THEIR OWN SURVEYOR IF THEY SO DESIRE; and whenever the extent of the damage is ascertainable, the majority (in amount) of the Underwriters may take or may require the Assured to take tenders for the repair of such damage. In cases where a tender is accepted by or with the approval of Underwriters, the Underwriters will make an allowance at the rate of 30 per cent. per annum on the insured value for the time actually lost in waiting for tenders. IN THE EVENT OF THE ASSURED FAILING TO COMPLY WITH THE CONDITIONS OF THIS CLAUSE 15 PER CENT. SHALL BE DEDUCTED FROM THE AMOUNT OF THE ASCERTAINED CLAIM.

HELD COVERED in case of any breach of warranty as to cargo, trade, locality, or date of sailing, provided notice be given, and any additional premium required be agreed immediately after receipt of advices of breach or proposed breach by Owners.

"Notwithstanding anything herein contained to the contrary, this Policy is warranted free of capture, seizure, arrest, restraint, or detainment, and the consequences thereof or any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war."

In Witness Whereof, the said Boston Insurance Company have caused these Presents to be signed by their President or Vice-President and attested by their Secretary or Assistant Secretary, in the City of New York, this 22nd day of May one thousand nine hundred and Eighteen

Asst. Secretary. Vice-President.

O-200-M

No claim shall be allowed in respect of scraping or painting the Vessel's bottom except as provided in Rule of Practice VIII of the Association of Average Adjusters of the United States.

Grounding in the Panama Canal or in the Suez Canal or in the Manchester Ship Canal or its connections, or in the River Mersey above Rock Ferry Slip, or in the River Plate (above Buenos Aires) or its tributaries, or in the Danube, Demerara, or Bilbao River, or on the Yenikale or Bilbao Bar, shall not be deemed to be a stranding.

Average payable on each valuation separately or on the whole, without deduction of thirds, new for old, whether the average be particular or general.

In no case shall Underwriters be liable for unrepaired damage in addition to a subsequent total loss sustained during the term covered by this Policy.

In ascertaining whether the Vessel is a constructive total loss, only the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the Vessel or wreck shall be taken into account.

In the event of total or constructive total loss, notice to be made by the Underwriters for freight, whether notice of abandonment has been given or not.

Notwithstanding anything herein contained to the contrary this Policy is warranted free from particular average under 3 per cent., or unless stranding be stated, but nevertheless when the Vessel shall have been stranded, sunk, on fire, or in collision with any other Ship or Vessel, Underwriters shall pay the damage occasioned thereby, and the expenses of sighting the bottom after stranding shall be paid, if reasonably incurred, even if no damage be found.

The warranty and conditions as to average 3 per cent. to be applicable to each voyage as if separately insured, and a voyage shall be deemed to commence at one of the following periods to be selected by the Assured when making up the claim, viz.: at any time at which the Vessel (1) begins to load cargo or (2) sails in ballast to a loading port. Such voyage shall be deemed to continue during the ensuing period until either she has made one outward and one homeward passage (including an intermediate ballast passage, if made) or has carried and discharged two cargoes, whichever may first happen, and further, in either case, until she begins to load a subsequent cargo or sails in ballast for a loading port. When the Vessel sails in ballast to effect damage repair such sailing shall not be deemed to be a sailing for a loading port although she trades at the repairing port. In calculating the 3 per cent. above referred to, particular average occurring outside the period covered by this Policy may be added to particular average occurring within such period provided it occur upon the same voyage (as above defined), but only that portion of the claim arising within such period shall be recoverable hereon. The commencement of a voyage shall not be fixed so as to overlap another voyage on which a claim is made on this or the preceding Policy.

Should the Vessel at the expiration of this Policy be at sea, or in distress, or at a port of refuge or of call, she shall, provided previous notice be given to the Underwriters, be held covered at a pro rata monthly premium to her port of destination.

Should the Vessel be sold or transferred to other ownership, then, unless the Underwriters agree in writing to such sale or transfer, this Policy shall thereupon become cancelled from date of sale or transfer, unless the Vessel has cargo on board and has already sailed from her loading port, or is at sea in ballast, in either of which cases such cancellation shall be suspended until arrival at final port of discharge if with cargo, or at port of destination if in ballast. A pro rata daily return of premium shall be made.

Notwithstanding anything herein contained to the contrary, this policy is warranted free of capture, seizure, arrest, restraint, or detainment, and the consequences thereof, or of any attempt thereat (piracy excepted) and also from all consequences of hostilities or warlike operations, whether before or after declaration of war.

To Return { 48 81/100ths } per cent. net for each uncommenced month if it be mutually agreed to cancel this Policy. } and arrival

per cent. net for each consecutive days the Vessel may be laid up in port:—

A period in port falling between two insurances to be allowed pro rata on each, underwriters on each insurance agreeing to pay their pro rata proportion of the Return due.

In the event of anything whereby loss or damage may result in a claim under this Policy, notice shall be given to the Underwriters, where practicable, prior to survey, so that they may appoint their own Surveyors if they so desire and wherever the extent of the damage is ascertainable, the majority (in amount) of the Underwriters may take it may require the Assured to take tenders for the repair of such damage. In cases where a tender is accepted by or with the approval of the Underwriters, the Underwriters will make an allowance at the rate of 50 per cent. per annum on the insured value for the time actually lost in waiting for tenders. In the event of the Assured failing to comply with the conditions of this clause 10 per cent. shall be deducted from the amount of the ascertained claim.

And covenant in case of any breach of warranty as to cargo, trade, locality, or date of sailing, provided notice be given, and any additional premium required be agreed immediately after receipt of advices of breach or proposed breach by Owners.

IN WITNESS WHEREOF, THE THAMES & MERSEY MARINE INSURANCE COMPANY, LIMITED, OF LIVERPOOL, and THE UNION MARINE INSURANCE COMPANY, LIMITED, OF LIVERPOOL, have caused these Presents to be signed by their Manager in the City of New York, but this Policy shall not be valid unless countersigned by the duly authorized representative of the said Companies.

THE THAMES & MERSEY MARINE INSURANCE COMPANY, *Limited*,

ONE HUNDRED SIXTY ONE THOUSAND SEVEN HUNDRED THIRTY NINE - - - - - - - - Dollars.

THE UNION MARINE INSURANCE COMPANY, *Limited*,

ONE HUNDRED SIXTY ONE THOUSAND SEVEN HUNDRED THIRTY NINE - - - - - - - - - Dollars.

W. W. Fowler

Manager

Countersigned at New York the 1st day of May, 19 18

Frank St. Duty

Assistant Manager

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Plaintiffs' Exhibit 8.

UNITED FRUIT COMPANY and/or ELDERS & FYFFES, LTD.

and/or the owning companies of the below mentioned vessels, its, or their successors and assigns.

FOR ACCOUNT OF WHOM IT MAY CONCERN.

LOSS, IF ANY, PAYABLE TO THE UNITED FRUIT COMPANY OR THEIR ORDER.

are by this instrument insured on the Body, Tackle and Apparel, Ordnance, Munitions, Artillery, Boats and other Furniture, Machinery, Refrigerating Machinery and Insulation, if any, Boilers, Fuel, Stores and Provisions and anything connected therewith of and in the Steamships named below, or by whatsoever other name or names the said steamship is or shall be called, lost or not lost, for and *during the space of twelve calendar months.*

AT AND FROM the 1st day of May, 1918.
UNTIL the 1st day of May, 1919.
} beginning and ending with noon Greenwich mean time.

As employment may offer, in port and at sea, in docks and in or on dry docks, on marine railways, gridirons and pontoons, at all times, in all places, and on all occasions, services and trades whatsoever and wheresoever, under steam or sail, with leave to sail with or without Pilots, TO TOW AND TO BE TOWED, and to assist vessels and/or craft in all situations and to any extent; to render salvage services, and to go on trial trips, with liberty to discharge, exchange, and to take on board goods, specie, passengers and stores, wherever the vessel may call at or proceed to, without being deemed a deviation, and with liberty to carry goods, live cattle, etc., on deck or otherwise and liable for contribution to jettison of same if under cover. With leave to dock, undock, and change docks as often as may be required, and to go in or on, and out of or off dry docks and on or off marine railways and/or gridirons and/or pontoons and/or, to adjust compasses, and including all risks of every kind incidental to these operations.

THIS INSURANCE TO ATTACH AND COVER UPON THE STEAMERS NAMED AND FOR THE AMOUNT DESIGNATED UPON EACH IN THE FOLLOWING SCHEDULE, AND FOR SO MUCH AS CONCERNS THE ASSURED. BY AGREEMENT BETWEEN THE ASSURED AND ASSURERS IN THIS POLICY EACH OF SAID STEAMERS SHALL BE VALUED AS SHOWN BELOW:

AMOUNT INSURED HEREUNDER	Vessel	Value	AMOUNT INSURED HEREUNDER	Vessel	Value
$ 20,370.-	Pastores	$1,018,500	Forward 208,300.-		
20,370.-	Tenadores	1,018,500	9,490.-	San Jose	$174,450
20,370.-	Calamares	1,018,500	9,490.-	Esparta	474,450
~~Heredia~~	~~688,610~~		9,490.-	Limon	474,450
~~Peninsula~~	~~688,610~~		8,434.-	Sarramacca	421,740
~~Cartago~~	~~688,610~~		8,434.-	Coppename	421,740
12,652.-	Tivives	632,610	8,434.-	Suriname	421,740
12,652.-	Carrillo	632,610	10,544.-	Manzanares	~~527,170~~ 506250
12,652.-	Sixaola	632,610	10,016.-	Tortuguero	500,810
12,652.-	Turriabla	632,610	9,490.-	Reventazon	474,450
12,652.-	Abangarez	632,610	9,490.-	Barranca	~~474,450~~ 455200
12,652.-	Zacapa	632,610	9,698.-	Pacuare	~~434,935~~ 417455
12,652.-	Metapan	632,610	8,434.-	Matina	~~421,740~~ 404500
12,652.-	Atenas	632,610	1,940.-	Tacoronte	97,000
12,652.-	Almirante	632,610	1,164.-	Taoro	58,200
12,652.-	Santa Marta	632,610	1,164.-	Guanche	58,200
10,670.-	San Mateo	533,500	466.-	Aquila de Oro	23,280
10,000.-	Levisa	500,000	$ 323,475.-		
$ 208,300.-					

Touching the adventures and perils which we, the said assurers, are contented to bear and take upon us, they are of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Countermart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and People, of what nation, condition or quality soever, Barratry of the Master and Mariners, and all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the said ship, etc., or any part thereof. And in case of any loss or misfortune it shall be lawful for the assured, their factors, servants and assigns, to sue, labor and travel for, in, and about the defence, safeguard and recovery of the said ship, etc., or any part thereof, without prejudice to this insurance; to the charges whereof the said Insurance Company will contribute according to the Rate and Quantity of the sum herein assured. And it is expressly declared and agreed that no acts of the insurer or insured in recovering, saving, or preserving the property insured shall be considered a waiver, or acceptance of abandonment; having been paid the consideration for this Insurance by the Assured or their Assigns at and after the rate of 3 per cent.

This insurance also specially to cover, subject to the "Excess of £600 clause below" cost of repairs, and/or loss of or damage to Hull or Machinery through the negligence of Master, Mariners, Engineers, or Pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the Machinery or Hull, or from explosions, riots, or other causes of whatsoever nature, arising either on shore or otherwise, howsoever, causing loss of or injury to the property hereby insured, provided such loss or damage has not resulted from want of due diligence by the owners of the ship, or any of them, or by the Manager, and to cover all risks incidental to steam navigation, or in or on dry docks, and on marine railways, gridirons and pontoons.

Anything herein to the contrary notwithstanding this insurance is warranted free from all claims of whatsoever nature, including claims under the collision clause,—other than Total Loss, and/or Constructive Total Loss, which shall be paid in full,—unless the aggregate of such claims, unreduced by any recoveries from other interests and/or parties, arising out of each separate accident exceeds £600 or $2,425, in which case this insurance shall be liable only for the amount by which such aggregate exceeds £600 or $2,425. For the purpose of this insurance each accident shall be treated separately, but it is agreed that a sequence of damages arising directly or indirectly from the same peril shall be treated as one accident.

In case of any claim for average, the repairs to be paid without deduction of one-third, whether the average be particular or general.

In the event of this policy beginning or ending while the vessel is in course of a voyage, the underwriters agree to pay their proportion of loss or damage sustained while the policy is in force, provided the loss or damage sustained on the entire voyage would have been recoverable if the policy had covered such voyage in its entirety.

General Average and Salvage Charges payable in accordance with Bill of Lading conditions, and/or as per foreign customs according to foreign statement, and/or York-Antwerp Rules, if required; and in the event of Salvage, towage, or other assistance being rendered to the vessel hereby insured by any vessel belonging in part or in whole to the same owners, it is hereby agreed that the value of such services (without regard to the common ownership of the vessels) shall be ascertained by Arbitration in the manner hereinafter provided for under the "Collision Clause," and the amount so awarded, so far as applicable to the interest hereby insured, shall constitute a charge under this Policy.

Warranted free from Capture, Seizure, and Detention, and the consequences of any attempt thereat, and all other consequence of hostilities (Piracy and Barratry excepted).

Held covered in the event of any breach of warranty, or deviation from the conditions of this Policy, at an equitable premium to be arranged, notice to be given on receipt of advices.

Privileged to comply with all Governmental and/or Naval instructions as to routes, ports of call and stoppages without prejudice to this insurance.

To RETURN 5% net per cent. for every 15 consecutive days the vessel may be in Port or in Dock, during such period the vessel being at the risk of the Underwriters, and having leave to dock, undock, and change docks, etc., and 10 2.3% net per cent. for every 15 days of unexpired time, if this Insurance be cancelled, and arrival. A period in port falling between two insurances to be allowed for pro rata on each, Underwriters on each insurance agreeing to pay their pro rata proportion of such return.

It is also agreed that any change of interest in the vessel hereby insured shall not affect the validity of this policy.

In the event of total loss or constructive total loss, no claim to be made by the Underwriters for freight, whether notice of abandonment has been given or not.

In ascertaining whether the Vessel is a constructive total loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account.

Should the vessel at the expiration of this policy be at sea, or in distress, or at a port of refuge or of call, she shall be held covered until safely arrived at port of destination or until lost at a pro rata daily premium if so desired by the insured.

COLLISION CLAUSE.

And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the assured and/or charterers shall in consequence thereof become liable to pay and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the ship hereby insured, we, the assurers, will pay the assured and/or charterers such proportion of such sum or sums so paid as our subscriptions hereto bear to the value of the ship hereby insured. And in cases where the liability of the ship has been contested, with the consent in writing of a majority of the underwriters on the hull and/or machinery (in amount), we will also pay a like proportion of the costs thereby incurred or paid; but when both vessels are to blame, then unless the liability of the owners and/or charterers of one or both of such vessels becomes limited by law, claims under the Collision Clause shall be settled on the principle of CROSS LIABILITIES as if the owners and/or Charterers of each vessel had been compelled to pay to the owners and/or charterers of the other of such vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the assured and/or charterers in consequence of such collision.

And it is further agreed that the ships insured in this clause shall apply to the case where both vessels are the property, in part or in whole, of the assured and/or charterers, and any question or difference arising as to the amount to be paid by or to the assured and/or charterers in consequence of such collision, or as to the proportion of liability as between the two ships, being left to the decision of a single Arbitrator, if the parties can agree upon a single Arbitrator, or failing such agreement to the decision of Arbitrators, one to be appointed by the managing owners and/or charterers of both vessels, and one to be appointed by the majority in amount of Underwriters interested in each vessel; the two Arbitrators chosen to choose a third Arbitrator before entering upon the reference. The terms of the Arbitration Act of 1889 to apply to such reference, and the decision of such sheole, or of any two of such three Arbitrators, appointed as above, to be final and binding.

Provided always that this clause shall in no case extend to any sum which the assured and/or charterers may become liable to pay, or shall pay for removal of obstructions under statutory powers, for injury to harbors, wharves, piers, stages and similar structures, consequent on such collision, or in respect of the Cargo or engagements of the Insured Vessel, or for loss of life or personal injury.

This insurance is fully to indemnify the assured for any and all charges and expenses applicable to the vessel in respect of the perils insured hereunder, irrespective of the value of the vessel, and this policy shall pay its share of such charges and expenses in the proportion which the amount hereby insured bears to the value as declared herein.

It is agreed that the owners and/or managers are at liberty to insure Disbursements and/or other interests to any amount at their own absolute discretion: and the Underwriters hereby waive disclosure of the amounts so insured.

In the event of the vessel hereby insured being chartered and/or sub-chartered to the United Fruit Company, or any of its subsidiary companies, this insurance is to protect the charterers and/or sub-charterers in respect of the perils insured hereunder.

It is further understood and agreed that in the event of any of the within insured vessels being requisitioned by any Government under conditions whereby such government assumes the marine risks, the insurance in respect to said vessel shall be cancelled as and from the date of such requisition, and pro rata daily return of premium on the basis as hereinbefore provided for cancellation, shall be made thereon.

Anything in this policy to the contrary notwithstanding it is distinctly understood and agreed that this insurance is and shall be all matters pertaining thereto be treated as a separate and distinct contract in respect to each vessel insured hereunder.

It is hereby further specially understood and agreed that the terms and conditions of this printed form are to be regarded as substituted for the terms and conditions printed in the policy to which it is attached, the latter being hereby waived.

New York, May 1st, 1918.

THE THAMES AND MERSEY MARINE INSURANCE COMPANY, LIMITED,
THE UNION MARINE INSURANCE COMPANY, LIMITED,
BRANCH,

Kenneth Kay
ASSISTANT MANAGER.

U. F. Co
J. & H. No. 3—8,000-4-1918

Attached to and made part of Policy No. 351

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No. 351

AMERICAN HULL 1916 FORM
Sept. 1, 1917 Edition.

The Thames & Mersey Marine Insurance Company, Limited,
UNITED STATES BRANCH
—AND—
The Union Marine Insurance Company, Limited,
UNITED STATES BRANCH.

ASSURED

UNITED FRUIT COMPANY AND/OR ELDERS AND FYFFES, LIMITED.

Expires May 1st, 1919.

H. K. FOWLER, Manager,
F. H. CAUTY, Assistant Manager,
27 WILLIAM STREET, NEW YORK.

SETTLED ... Two hundred and twenty seven 62/100 DOLLARS
U.S.P.O. Lat anchorage claim 100%

227 62/100
November 1st 1917
Jno. D. L. pays $113.81
Union --- 113.81
$227.62

SETTLED HEREON Thirty pounds five shillings and [illegible] DOLLARS
FOR £30-5-0 Nov. 22-1917
Struck a submerged wreck
£ 30-5-0

EFFECTED BY
JOHNSON & HIGGINS
Entered 32103
Examined
45 & 51 WALL ST., N. Y.

[fol. 96] PLAINTIFFS' EXHIBIT 9

Recovery Statement

(Omitted pursuant to stipulation.)

PLAINTIFFS' EXHIBIT 10

Section 4 of the Act of Parliament of December 21, 1906, Commonly Known as the Marine Insurance Act

4. (1) Every contract of marine insurance by way of gaming or wagering is void.

(2) A contract of marine insurance is deemed to be a gaming or wagering contract—

(a) Where the assured has not an insurable interest as defined by this Act, and the contract is entered into with no expectation of acquiring such an interest; or

(b) Where the policy is made "interest or no interest," or "without further proof of interest than the policy itself," or "without benefit of salvage to the insurer," or subject to any other like term:

Provided that, where there is no possibility of salvage, a policy may be effected without benefit of salvage to the insurer.

PLAINTIFFS' EXHIBIT 11

(Edwards v. Motor Union.)

(Omitted pursuant to stipulation.)

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[fol. 97] PLAINTIFFS' EXHIBIT 12

S/S. "Almirante"

(Sunk September 6th, 1918, After Collision with S/S. "Hisko")

(Page 18 Original construction cost (1908) $575,595.)
(Page " Original cost to owners (1914) 400,000.)

Total Insurances in Force in 1918

Page 42	American Insurance on Hull On an agreed valuation of $632,610. (Including line of $50,609. retained by United Fruit Company)		335,282.
Page 44	English Insurance on Hull	£61,305.	
" "	English Insurance on P P I policies	65,105.	
		£126,410.	
	At exchange of say—4.75¾		601,395.57
			Say $936,677.57
Page 29	Award (including stores and sundries) (i. e. recovery from "Hisko")		$1,763,013.38
	Legal Expenses	$300,024.53	
	After deduction of legal and other expenses and allowing credit for bank interest, the net recovery received by owners amounted to $1,463,997.09 which was apportioned as follows:		
Page 45	American Insurance (Hull policies)	$297,602.90	
	Less recovery applicable to line retained by United Fruit Company	44,921.54	$252,681.36

[fol. 98]

Page 44 English Underwriters Hull Policies	£61,248.7.6		
or	$207,367.88		
Legal Expenses	23,170.53	184,197.35	
		$436,878.71	
Page 44 English Underwriters P P I Policies	£32,552.10.0		
or	$107,992.92		
Legal Expenses	21,993.28	85,999.64	
		$522,878.35	
Underwriters Received			$522,878.35
Credited to Owners	$896,197.20		
Also credited to Owners Applicable to line retained by United Fruit Company	44,921.54	941,118.74	
Owners Received			941,118.74
			$1,463,997.09

Final Position of Assured:

Originally received from Underwriters	$936,677.57		
Less line retained by United Fruit Co.	50,609.00	Say	$886,068.57
Balance recovery as per statement, including $44,921.54 The proportion of recovery applicable to line retained by the United Fruit Company			941,118.74
Net balance after payment of all expenses			$1,827,187.31

MEM—

The amount awarded by the court as representing the Owners' loss was $1,763,013.38.

[fol. 99] PLAINTIFFS' EXHIBIT 13

1. Hull Underwriters in England Who Also Had P. P. I. Policies

	Hull	P.P.I.
Commercial Union	£ 4,784.	£ 3,000.
London Assurance	4,784.	2,500.
Royal Exchange	4,784.	1,835.
Merchants	3,596.	1,275.
Sea	1,429.	3,975.
Motor Union	950.	1,220.
United British	950.	1,220.
British Commonwealth	475.	610.
British & Foreign	1,554.	6,915.
Lloyd's	31,545.	21,140.
	£54,851. (About 90% of hull total)	£43,690. (About two thirds of P P I total)

2. Those Only on Hull

Yangtsze	£ 950.
Norwich Union	2,398.
Thames & Mersey	1,864.
Ulster	621.
Maritime	621.
	£6,454.

1. Received say £48,600 Hull
17,400 P. P. I.

£66,000.

or say, 120% of amounts paid on Hull.

[fol. 100] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

#844

L. 57-271

ÆTNA INSURANCE COMPANY, Plaintiff,

against

UNITED FRUIT COMPANY, Defendant

L. 57-272

UNION MARINE AND GENERAL INSURANCE COMPANY, LIMITED, Formerly Union Marine Insurance Company, Limited, Plaintiff,

against

UNITED FRUIT COMPANY, Defendant

L. 57-273

BOSTON INSURANCE COMPANY, Plaintiff,

against

UNITED FRUIT COMPANY, Defendant

Bigham, Englar, Jones & Houston (D. Roger Englar, and Martin Detels, of Counsel), for plaintiffs.

Kirlin, Campbell, Hickox, Keating & McGrann (Cletus Keating and Richard Sullivan, of Counsel), for defendant.

OPINION OF PATTERSON, D. J.

[fol. 101] PATTERSON, D. J.:

The three actions were tried together. There was an agreed statement of facts, with trial before a jury of one and counter motions for directed verdict.

The plaintiffs were hull insurers of the defendant's steamship "Almirante". The policies were valued policies, it being agreed in them that the vessel had a value of $632,610. Other policies of similar tenor were issued by other insurance companies, and the aggregate amount of insurance (including an amount carried by the defendant as self-in-

surer) was $632,610. On September 6, 1918, the "Almirante" came into collision with the steamship "Hisko" and became a total loss. A few months later the plaintiffs and other insurers paid to the defendant the full amounts covered by the policies.

The insurers and the defendant jointly retained counsel to push a claim against the United States as owner of the "Hisko". Congress passed a special act allowing suit against the United States for the loss of the "Almirante", but barring recovery of interest. In the suit then brought the defendant recovered $1,761,693.02 as the actual value of the "Almirante" and received payment of that amount from the United States on July 26, 1932. The legal expenses incurred in the litigation came to $300,024.53, and it is conceded that such expenses were fair and reasonable. They were paid out of the fund, and the net recovery was thus reduced to $1,461,668.49. Out of this balance the defendant remitted to the plaintiffs and other hull insurers, in September and November 1932, the amounts of their payments under the policies, less part of the expenses. The [fol. 102] part of the expenses charged against the insurers was smaller, in proportion to their interests, than the part charged against the defendant. As a result of this treatment of the fund recovered, the plaintiffs and other insurers in like position received back about 89 per cent of what they had originally paid to the defendant under the policies.

The plaintiffs make alternate claims in their pleadings. The broader claim is that the hull insurers as a group are entitled to the entire net recovery, $1,461,668.49, and that the plaintiffs should have their proportionate shares of that amount, less what they have already received. This claim is not pressed in this court, in view of what was decided in The Livingstone, 130 Fed. 746 (C. C. A. 2). The narrower claim is for the full amount of their payments to the defendant under the policies in 1918, without deduction of any kind, and for interest on those payments from 1918, less of course the amounts received in 1932. All American underwriters are making similar claims; the English underwriters are making no claims.

There are further facts relative to policies of additional insurance on the "Almirante" and to subrogation receipts sent out by the defendant to two of the plaintiffs. They

are without significance in the present controversy and will be passed.

A marine policy of insurance being a contract of indemnity, the insurer on payment is subrogated to the rights of the insured against persons who caused the loss. Phœnix Ins. Co. v. Erie Transportation Co., 117 U. S. 312; Liverpool Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 462. The subrogation is total where the insured's loss has been made [fol. 103] good in full by the insurer. It is partial where only a part of the loss has been paid by the insurer. In the latter case the insurer is entitled to whatever is left after the insured has been made whole for his loss and for his expenses in recovering from those responsible for the loss. Shawnee Fire Ins. Co. v. Cosgrove, 86 Kans. 374; Svea Ins. Co. v. Packham, 92 Md. 464; Newcomb v. Cincinnati Ins. Co., 22 Ohio St. 382. By the rule of subrogation insured and insurer are ultimately placed in the same position that they would have occupied if the insured had first recovered from the persons at fault and had thereafter brought suit to compel the insurer to honor the policy; in such a case the insurer, if liable at all, is liable only for the balance necessary to afford complete reimbursement to the insured. See Ætna Casualty Co. v. Phœnix Co., 285 U. S. 209, 214.

These broad rules govern the relative rights of insured and insurer under a valued policy of hull insurance, with the qualification that in the case of a valued policy the value of the hull is to be taken at the figure set in the policy rather than at actual value. In a valued policy the parties have made an agreement on the value of the property covered, in effect stipulating what the damages are to be in the event of total loss. Except for cases of fraudulent overvaluation, the agreed valuation is conclusive on both in respect to rights and duties arising from the policy. Marine Ins. Co. v. Hodgson, 6 Cranch 206; The Potomac, 105 U. S. 630, 635; International Navigation Co. v. Atlantic Mutual Ins. Co., 100 Fed. 304 (D. C. N. Y.); Providence & Stonington S. S. Co. v. Phenix Ins. Co., 89 N. Y. 559, 564-565. In [fol. 104] suit on the policy the insured may not prove a higher actual value, the insurer may not prove a lower. It follows that if the owner of a vessel has already collected damages from one responsible for the loss and later takes action against an insurer which has insured the hull under a valued policy, the owner may hold the insurer for no more

than the excess of the agreed value over the net amount already in hand. His suit is for the agreed value, but he must credit the insurer with the net proceeds of his collection from the party who caused the loss. See Arnold on Marine Insurance, Section 1229. Goole & Hull Steam Towing Co. v. Ocean Marine Ins. Co. (1928) 1 K. B. 589, is an instance. The insured vessel was damaged in collision to the extent of 5,000 £. The owner recovered 2,500 £ from the other vessel, and then brought suit on a hull policy wherein an agreed value of 4,000 £ was placed on the vessel. The owner conceived that he should recover 2,500 £, the difference between actual loss and the collection from the other vessel. It was held, however, that the insurer was liable only for 1,500 £, the difference between agreed valuation and the collection from the other vessel. The case was decided on general principles of marine insurance, not on any provisions in the Marine Insurance Act. So in the present case if the sequence of events had been that the owner of the "Almirante" first collected a net sum of $1,461.668.49 from the United States for loss of the vessel and then brought suit against hull insurers on policies in which the agreed value of the vessel was $632,610, no recovery against the insurers would stand.

By like reasoning it has become the accepted rule that where the hull insurer has first paid the value agreed on in [fol. 105] the policy and the owner later recovers a sum from a third person whose negligence caused or contributed to the loss, the insurer may recoup the net sum so recovered, up to the full amount of the payment under the policy. The rule applies whether the net sum recovered from the third person is smaller or greater than the sum received from the insurer on agreed valuation. If the net sum recovered from the offender is less than the amount already paid by the insurer as agreed value, the insurer will be beneficially entitled to the entire net sum recovered, to the exclusion of the insured. The St. Johns, 101 Fed. 469 (D. C. N. Y.); Federal Ins. Co. v. Detroit Fire & Marine Ins. Co., 202 Fed, 648, 651 (C. C. A. 6); North of England Ins. Ass'n v. Armstrong, L. R. 5 Q. B. 244; Thames & Mersey Marine Ins. Co. v. British & Chilian S. S. Co. (1915) 2 K. B. 214, affirmed (1916) 1 K. B. 30; Egan v. British & Foreign Marine Ins. Co., 193 Ill. 295. See also Arnold on Marine Insurance, Sections 1229-1230. If the insured by his suit against the per-

son responsible for his loss collects a net fund greater than the amount which the insurer has already paid as agreed value, the insured is bound to turn over to the insurer a sum equal to the amount paid by the insurer, without deduction of anything for expenses, and may keep only what is left. That was the precise situation in The Livingstone, 130 Fed. 746 (C. C. A. 2). There the insurer had paid to the owner of a vessel totally lost the sum of $25,000, the value agreed on in the policy. The owner later recovered from the vessel at fault $37,500 as the actual value of the vessel. The district court decided that the insurer was entitled to the whole [fol. 106] fund. The Circuit Court of Appeals held, however, that the insurer was entitled only to $25,000, the amount which it had paid out. The record in the Livingstone case shows that on appeal the insured sought to have the insurer charged with part of the expenses of the suit, but the decision was that the insurer should have the $25,000 without deduction,—full reimbursement but no profit. "We conclude, therefore, that the insurance companies, having paid the full amount stipulated in the policies, are entitled to recoup that sum, and that neither the abandonment nor the subrogation permits them to appropriate the balance recovered from the wrongdoer" (p. 749).

The defendant urges that the decision in The Livingstone was due to the peculiar circumstances present in that case. The fact is, however, that The Livingstone decision rested on broad grounds; the result could not have been different without departure from settled rules relative to valued policies of hull insurance.

In the present case the defendant finally recovered from the owner of the vessel at fault in the collision a sum far beyond the amount which it had received from the insurers as the full value of the vessel agreed on in the policies. After payment of all expenses incurred in recovery, the defendant still had a fund more than double the agreed value. It was accordingly bound to pay over to the insurers amounts equal to those which it had received from them as payments under the valued policies, and there was no warrant for charging any part of the legal expenses against the insurers. In other words, the defendant should have paid to Ætna Insurance Company $18,978 instead of $16,845.24, to Boston Insurance Company $15,815 instead

[fol. 107] of $14,037.71, and to Union Marine and General Insurance Company $6,326 instead of $5,615.08.

The defendant protests that this result will violate the rule that the insured is to be completely reimbursed before the insurer takes anything by subrogation. But in cases of total loss under a hull policy the insured is rarely reimbursed for his actual loss where the policy is a valued one, and the reason is that he has made an agreement on value with his insurers. This protest, as well as the argument that the insured should be treated as constructive co-insurer for the excess of actual value over agreed value, is answered by Judge Addison Brown in The St. Johns, supra.

There remains the plaintiffs' demand for interest. They claim that under subrogation they ought to have interest on their payments from 1918 on, pointing out that in The Livingstone, supra, the insurer was allowed interest from the time of its payment under the policy. In the Livingstone case the insured had recovered interest as part of the relief given against the offending vessel; consequently the insurer was held entitled to interest by subrogation. Here the defendant took nothing by way of interest. It got no redress as to that element of its loss. As to interest it held nothing as trustee for the plaintiffs, and their right of subrogation gives them nothing. See Standard Marine Ins. Co. v. Scottish Metropolitan Assn. Co., 283 U. S. 284, 288. The interest allowed will be only on the unpaid balances from 1932 on. That much the plaintiffs ought to have, for the defendant should have reimbursed them in full at that time and has since had the use of their money.

There will be a verdict directed for the plaintiffs. Ætna [fol. 108] Insurance Company will have a verdict for $2,132.76, Boston Insurance Company for $1,777.29, Union Marine and General Insurance Company for $710.92, each figure to carry interest from November 28, 1932.

December 11, 1936.

Robert P. Patterson, United States District Judge.

IN UNITED STATES DISTRICT COURT

[Title omitted]

EXTRACT OF THE MINUTES IN ÆTNA INSURANCE COMPANY ACTION—October 30, 1936

Now comes the Plaintiff by Bigham, Englar, Jones & [fol. 109] Houston, D. R. Englar of counsel, and moves the trial of this cause. Likewise comes the Defendant by Kirlin, Campbell, Hickox, Keating & McGrann, C. Keating and R. Sullivan, counsel. Counsels stipulate to try case with jury of one. Thereupon a juror is duly sworn, and the cause proceeds to Trial with Law 57-272 and Law 57-273. Counsel for plaintiff opens to the Court. Counsel for defendant opens to the Court. Witness called on behalf of plaintiff. Plaintiff rests and moves for direction of a verdict. Defendant rests and moves for direction of a verdict dismissing bill with costs. Case argued. Decision reserved.

On December 12, 1936, the Court rendered its decision directing a verdict in favor of the plaintiff for $2,132.76 with interest from November 28, 1932.

Charles Weiser, Clerk.

[fol. 110] IN UNITED STATES DISTRICT COURT

[Title omitted]

EXTRACT OF THE MINUTES IN UNION MARINE, ETC., ACTION—October 30, 1936

Now comes the Plaintiff by Bigham, Englar, Jones & Houston, D. R. Englar of counsel, and moves the trial of this cause. Likewise comes the Defendant by Kirlin, Campbell, Hickox, Keating & McGrann, C. Keating and R. Sullivan, counsel. Counsels stipulate to try case with jury of one. Thereupon a juror is duly sworn, and the cause proceeds to Trial with Law 57-271 and Law 57-273. Counsel for plaintiff opens to the Court. Counsel for defendant opens to the Court. Witness called on behalf of plaintiff. Plaintiff rests [fol. 111] and moves for direction of a verdict. Defendant rests and moves for direction of a verdict dismissing bill with costs. Case argued. Decision reserved.

On December 12, 1936, the Court rendered its decision directing a verdict in favor of the plaintiff for $710.92, with interest from November 28, 1932.

Charles Weiser, Clerk.

In United States District Court

[Title omitted]

Extract of the Minutes in Boston Insurance Company Action—October 30, 1936

Now comes the plaintiff by Bigham, Englar, Jones & [fol. 112] Houston, D. R. Englar of counsel, and moves the trial of this cause. Likewise comes the Defendant by Kirlin, Campbell, Hickox, Keating & McGrann, C. Keating and R. Sullivan, counsel. Counsels stipulate to try case with jury of one. Thereupon a juror is duly sworn, and the cause proceeds to Trial with Law 57-271 and Law 57-272. Counsel for plaintiff opens to the Court. Counsel for defendant opens to the Court. Witness called on behalf of plaintiff. Plaintiff rests and moves for direction of a verdict. Defendant rests and moves for direction of a verdict dismissing bill with costs. Case argued. Decision reserved.

On December 12, 1936, the Court rendered its decision directing a verdict in favor of the plaintiff for $1,777.29 with interest from November 28, 1932.

Charles Weiser, Clerk.

[fol. 113] In United States District Court, Southern District of New York

L 57-271

Ætna Insurance Company, Plaintiff,

against

United Fruit Company, Defendant

Judgment

The issues joined in this action having regularly come on for trial at a stated term of this court on the 30th day of October, 1936, before the Honorable Robert P. Patterson,

United States District Judge, and a jury of one, and the plaintiff appearing by its attorneys, Bigham, Englar, Jones & Houston, and the defendant appearing by its attorneys, Kirlin, Campbell, Hickox, Keating & McGrann, and the allegations and proofs of both sides having been heard and considered, and at the close of the case both sides having moved for direction of a verdict, and after due deliberation the Court having directed a verdict in favor of the plaintiff, Aetna Insurance Company, for $2,132.76, with interest from November 28, 1932, and the costs of the said plaintiff having been duly taxed at $102.35, now it is

Ordered and adjudged that the plaintiff, Aetna Insurance Company, 89 Maiden Lane, Borough of Manhattan, New [fol. 114] York City, do recover of the defendant United Fruit Company, Pier 3, North River, Borough of Manhattan, New York City, the sum of $2,132.76, with interest from November 28, 1932, to date, amounting to $547.40 together with $102.35 costs and disbursements, amounting in all to the sum of $2,782.51, and that the plaintiff have execution therefor.

Judgment entered this 10th day of March, 1937.

Charles Weiser, Clerk.

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION AND ORDER ALLOWING APPEAL OF ÆTNA INSURANCE COMPANY

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The above-named plaintiff, the Aetna Insurance Com- [fol. 115] pany, feeling aggrieved by the judgment of the District Court of the United States for the Southern District of New York, entered herein on the 10th day of March 1937, hereby appeals from said judgment to the United States Circuit Court of Appeals for the Second Circuit, and prays that said appeal be allowed for the reasons specified in the assignment of errors filed with this petition, and also prays for an order allowing petitioner to prosecute said appeal, and that a transcript of the record, papers and proceedings on which the said judgment was made, may be duly

authenticated and sent to the United States Circuit Court of Appeals for the Second Circuit; and that a citation be issued as directed by law.

Dated, New York, April 3, 1937.

Bigham, Englar, Jones & Houston, Attorneys for Petitioner-Plaintiff, 99 John Street, New York, N. Y.

The above appeal is hereby allowed.

Dated, New York, April 3, 1937.

Alfred C. Coxe, U. S. D. J.

[fol. 116] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL OF ÆTNA INSURANCE COMPANY

SIRS:

Please take notice that the plaintiff above named, Aetna Insurance Company, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the judgment entered herein in the Office of the Clerk of the United States District Court for the Southern District of New York on the 10th day of March, 1937, in favor of the said plaintiff and against the defendant in the sum of $2,782.51; and the said plaintiff appeals from each and every part of said judgment, as well as from the whole thereof.

Dated, New York, April 3, 1937.

Yours, &c., Bigham, Englar, Jones & Houston, Attorneys for Plaintiff, 99 John Street, New York, N. Y.

To Messrs. Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for Defendant, 120 Broadway, New York, N. Y.

[fol. 117] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS OF ÆTNA INSURANCE COMPANY

Now comes the plaintiff, Ætna Insurance Company, by Bigham, Englar, Jones & Houston, its attorneys, and files the following assignment of errors:

1. The Court erred in directing a verdict in favor of the plaintiff for only $2,132.76, with interest only from November 28, 1932.

2. The Court erred in not directing a verdict in favor of the plaintiff for such proportion of the entire net recovery from the Government in the collision suit as the sum insured by plaintiff, and paid to defendant by plaintiff, bears to the agreed valuation of the S.S. "Almirante" as fixed by the policy issued by plaintiff to defendant.

3. The Court erred in not directing a verdict in favor of the plaintiff for the full amount of its proportionate share in the entire net recovery of $1,461,668.49, namely, $43,850.04, less $16,845.24, which plaintiff has already received, or a net amount of $27,004.80, together with interest [fol. 118] from November 28, 1932 on said unpaid balance of $27,004.80.

4. The Court erred in not directing a verdict in favor of plaintiff for at least an amount which, added to the payment it has already received, would constitute full and complete reimbursement in respect of plaintiff's loss, namely, the repayment of the sum of $18,978.00 made by plaintiff to defendant on December 5, 1918, plus interest from that date for the period during which plaintiff was deprived of the use of this sum, less the $16,845.24 received by plaintiff on November 28, 1932.

5. The Court erred in refusing to direct a verdict in favor of the plaintiff for at least the full amount of its payment in 1916, namely, $18,978.00, with interest thereon from December 5, 1918, less the amount received by plaintiff in 1932, namely, $16,845.24, together with interest on $2,132.76 from November 28, 1932.

6. The Court erred in denying plaintiff's motion to set aside the verdict directed in favor of plaintiff for $2,132.76 with interest from November 28, 1932, on the ground that it was contrary to law.

7. The Court erred in denying plaintiff's motion to set aside the verdict directed in favor of plaintiff for $2,132.76 with interest from November 28, 1932, on the ground that it was contrary to the evidence.

Wherefore, plaintiff prays that the judgment of the United States District Court for the Southern District of [fols. 119-120] New York be reversed, and for such other and further relief as to the Court may seem just and proper.

Dated, New York, April 2, 1937.

Bigham, Englar, Jones & Houston, Attorneys for Plaintiff, 99 John Street, New York, N. Y.

Citation of Ætna Insurance Company omitted in printing.

[fol. 121] In United States District Court

L 57-271

[Title omitted]

Petition and Order Allowing Appeal of United Fruit Company

The defendant, United Fruit Company, being aggrieved by the decision and judgment of the District Court of the Southern District of New York, which judgment was entered herein in the office of the Clerk of this Court on the 10th day of March, 1937 in favor of the plaintiff in the sum of $2,782.51, hereby prays that an appeal be allowed to the United States Circuit Court of Appeals for the Second Circuit.

Dated, New York, April 19, 1937.

United Fruit Company, by Kirlin, Campbell, Hickox, Keating & McGrann, its Attorneys, by Cletus Keating.

[fol. 122] Allowance of Appeal

Upon the foregoing petition, it is

Ordered that the appeal herein prayed for by the defendant, United Fruit Company, be and the same hereby is allowed.

Dated, New York, April 22nd, 1937.

Robert P. Patterson, U. S. D. J.

IN UNITED STATES DISTRICT COURT

L 57-271

[Title omitted]

NOTICE OF APPEAL OF UNITED FRUIT COMPANY

Please take notice that the defendant, United Fruit Company, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit, to be held in the Court Rooms in the United States Court House, Borough of Manhattan, City of New York, from the judgment entered herein on the 10th day of March, 1937, in favor of the plaintiff in the sum of $2,782.51 and against the defendant, and from [fol. 123] each and every part of said judgment as well as the whole thereof.

Dated, New York, April 19, 1937.

Yours, etc., Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for Defendant, Office and Post Office Address, 120 Broadway, Borough of Manhattan, City of New York.

To Bigham, Englar, Jones & Houston, Esqs., Attorneys for Plaintiff, 39 John Street, Borough of Manhattan, City of New York. Charles Weiser, Esq., Clerk.

[fol. 124] IN UNITED STATES DISTRICT COURT

L 57-271

[Title omitted]

ASSIGNMENT OF ERRORS OF UNITED FRUIT COMPANY

Now comes the defendant United Fruit Company, by Kirlin, Campbell, Hickox, Keating & McGrann, its attorneys, and files the following assignment of errors:

1. The Court erred in directing a verdict in favor of the plaintiff for $2,132.76, with interest from November 28, 1932.

2. The Court erred in not directing a verdict in favor of the defendant dismissing the complaint.

3. The verdict returned on the decision of the Trial Court is contrary to the evidence submitted on the trial of the said cause and is not supported by it.

4. The judgment entered by the Trial Court on the verdict is contrary to the evidence submitted upon the trial and is erroneous in law.

[fol. 125] 5. The Court erred in denying defendant's motion to set aside the verdict directed in favor of plaintiff for $2,132.76, with interest from November 28, 1932, on the ground that it was contrary to the evidence.

6. The Court erred in denying defendant's motion to set aside the verdict directed in favor of plaintiff for $2,132.76, with interest from November 28, 1932, on the ground that it was contrary to law.

7. The Court erred as a matter of law in holding that underwriters are entitled by subrogation to recover from insured a proportionate share of recovery without any deduction for legal expenses.

Wherefore defendant prays that the judgment of the United States District Court for the Southern District of New York in said cause be reversed.

Dated New York, April 19, 1937.

Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for Defendant, 120 Broadway, New York, N. Y.

[fol. 126] Citation of United Fruit Company omitted in printing.

[fol. 127] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

L 57-272

UNION MARINE AND GENERAL INSURANCE COMPANY, LIMITED, Formerly Union Marine Insurance Company, Limited, Plaintiff,

against

UNITED FRUIT COMPANY, Defendant.

JUDGMENT

The issues joined in this action having regularly come on for trial at a stated term of this court on the 30th day of October, 1936, before the Honorable Robert P. Patterson, United States District Judge, and a jury of one, and the plaintiff appearing by its attorneys, Bigham, Englar, Jones & Houston, and the defendant appearing by its attorneys, Kirlin, Campbell, Hickox, Keating & McGrann, and the allegations and proofs of both sides having been heard and considered, and at the close of the case both sides having moved for direction of a verdict, and after due deliberation the Court having directed a verdict in favor of the plaintiff, Union Marine and General Insurance Company, Limited, for $710.92, with interest from November 28, 1932, and the costs of the said plaintiff having been duly taxed at $32.30, now it is

Ordered and adjudged that the plaintiff, Union Marine and General Insurance Company, Limited, formerly Union Marine Insurance Company, Limited, 116 John Street, Borough of Manhattan, New York City, do recover of the de- [fol. 128] fendant United Fruit Company, Pier 3, North River, Borough of Manhattan, New York City, the sum of $710.92, with interest from November 28, 1932, to date, amounting to $182.46, together with $32.30 costs and disbursements, amounting in all to the sum of $925.68, and that the plaintiff have execution therefor.

Judgment entered this 10th day of March, 1937.

Charles Weiser, Clerk.

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION AND ORDER ALLOWING APPEAL OF UNION MARINE, ETC.

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The above-named plaintiff, Union Marine and General Insurance Company, Limited, formerly Union Marine In-
[fol. 129] surance Company, Limited, feeling aggrieved by the judgment of the District Court of the United States for the Southern District of New York, entered herein on the 10th day of March, 1937, hereby appeals from said judgment to the United States Circuit Court of Appeals for the Second Circuit, and prays that said appeal be allowed for the reasons specified in the assignment of errors filed with this petition, and also prays for an order allowing petitioner to prosecute said appeal, and that a transcript of the record, papers and proceedings on which the said judgment was made, may be duly authenticated and sent to the United States Circuit Court of Appeals for the Second Circuit; and that a citation be issued as directed by law.

Dated, New York, April 3, 1937.

Bigham, Englar, Jones & Houston, Attorneys for Petitioner-Plaintiff, 99 John Street, New York, N. Y.

The above appeal is hereby allowed.

Dated, New York, April 3, 1937.

Alfred C. Coxe, U. S. D. J.

[fol. 130] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL OF UNION MARINE, ETC.

SIRS:

Please take notice that the plaintiff above named, Union Marine and General Insurance Company, Limited, formerly Union Marine Insurance Company, Limited, hereby appeals

to the United States Circuit Court of Appeals for the Second Circuit from the judgment entered herein in the Office of the Clerk of the United States District Court for the Southern District of New York on the 10th day of March, 1937, in favor of the said plaintiff and against the defendant in the sum of $925.68; and the said plaintiff appeals from each and every part of said judgment, as well as from the whole thereof.

Dated, New York, April 3, 1937.

Yours, &c., Bigham, Englar, Jones & Houston, Attorneys for Plaintiff, 99 John Street, New York, N. Y.

To Messrs. Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for Defendant, 120 Broadway, New York, N. Y.

[fol. 131] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS OF UNION MARINE, ETC.

Now comes the plaintiff, Union Marine and General Insurance Company, Limited, formerly Union Marine Insurance Company, Limited, by Bigham, Englar, Jones & Houston, its Attorneys, and files the following assignment of errors:

1. The Court erred in directing a verdict in favor of the plaintiff for only $710.92, with interest only from November 28, 1932.

2. The Court erred in not directing a verdict in favor of the plaintiff for such proportion of the entire net recovery from the Government in the collision suit as the sum insured by plaintiff, and paid to defendant by plaintiff, bears to the agreed valuation of the S. S. "Almirante" as fixed by the policy issued by plaintiff to defendant.

3. The Court erred in not directing a verdict in favor of the plaintiff for the full amount of its proportionate share in the entire net recovery of $1,461,668.49, namely, $14,-
[fol. 132] 616.68, less $5,615.08, which plaintiff has already received, or a net amount of $9,001.60, together with inter-

est from November 28, 1932 on said unpaid balance of $9,001.60.

4. The Court erred in not directing a verdict in favor of plaintiff for at least an amount which, added to the payment it has already received, would constitute full and complete reimbursement in respect of plaintiff's loss, namely, the repayment of the sum of $6,326.00 made by plaintiff to defendant on January 2, 1919, plus interest from that date for the period during which plaintiff was deprived of the use of this sum, less the $5,615.08 received by plaintiff on November 28, 1932.

5. The Court erred in refusing to direct a verdict in favor of the plaintiff for at least the full amount of its payment in 1919, namely, $6,326.00, with interest thereon from January 2, 1919, less the amount received by plaintiff in 1932, namely, $5,615.08, together with interest on $710.92 from November 28, 1932.

6. The Court erred in denying plaintiff's motion to set aside the verdict directed in favor of plaintiff for $710.92 with interest from November 28, 1932, on the ground that it was contrary to law.

7. The Court erred in denying plaintiff's motion to set aside the verdict directed in favor of plaintiff for $710.92 with interest from November 28, 1932, on the ground that it was contrary to the evidence.

[fols. 133-134] Wherefore, plaintiff prays that the judgment of the United States District Court for the Southern District of New York to be reversed, and for such other and further relief as to the Court may seem just and proper.

Dated, New York, April 2, 1937.

Bigham, Englar, Jones & Houston, Attorneys for Plaintiff, 99 John Street, New York, N. Y.

Citation of Union Marine, etc., omitted in printing.

[fol. 135] IN UNITED STATES DISTRICT COURT

L 57-272

[Title omitted]

PETITION AND ORDER ALLOWING APPEAL OF UNITED FRUIT COMPANY

The defendant, United Fruit Company, being aggrieved by the decision and judgment of the District Court of the Southern District of New York, which judgment was entered herein in the office of the Clerk of this Court on the 10th day of March, 1937 in favor of the plaintiff in the sum of $925.68, hereby prays that an appeal be allowed to the United States Circuit Court of Appeals for the Second Circuit.

Dated, New York, April 19, 1937.

United Fruit Company, by Kirlin, Campbell, Hickox, Keating & McGrann, Its Attorneys, by Cletus Keating.

[fol. 136] ALLOWANCE OF APPEAL

Upon the foregoing petition, it is

Ordered that the appeal herein prayed for by the defendant, United Fruit Company, be and the same hereby is allowed.

Dated, New York, April 22nd, 1937.

Robert P. Patterson, U. S. D. J.

IN UNITED STATES DISTRICT COURT

L 57-272

[Title omitted]

NOTICE OF APPEAL OF UNITED FRUIT COMPANY

SIRS:

Please take notice that the defendant, United Fruit Company, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit, to be held in the Court

Rooms in the United States Court House, Borough of Man-
[fol. 137] hattan, City of New York, from the judgment entered herein on the 10th day of March, 1937, in favor of the plaintiff in the sum of $925.68 and against the defendant, and from each and every part of said judgment as well as the whole thereof.

Dated, New York, April 19, 1937.

Yours, etc., Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for Defendant, Office and Post Office Address, 120 Broadway, Borough of Manhattan, City of New York.

To Bigham, Englar, Jones & Houston, Esqs., Attorneys for Plaintiff, 99 John Street, Borough of Manhattan, City of New York. Charles Weiser, Esq., Clerk.

[fol. 138] In United States District Court

L 57-272

[Title omitted]

Assignment of Errors of United Fruit Company

Now comes the defendant United Fruit Company, by Kirlin, Campbell, Hickox, Keating & McGrann, its attorneys, and files the following assignment of errors:

1. The Court erred in directing a verdict in favor of the plaintiff for $710.92, with interest from November 28, 1932.

2. The Court erred in not directing a verdict in favor of the defendant dismissing the complaint.

3. The verdict returned on the decision of the Trial Court is contrary to the evidence submitted on the trial of the said cause and is not supported by it.

4. The judgment entered by the Trial Court on the verdict is contrary to the evidence submitted upon the trial and is erroneous in law.

[fol. 139] 5. The Court erred in denying defendant's motion to set aside the verdict directed in favor of plaintiff for $710.92, with interest from November 28, 1932, on the ground that it was contrary to the evidence.

6. The Court erred in denying defendant's motion to set aside the verdict directed in favor of plaintiff for $710.92, with interest from November 28, 1932, on the ground that it was contrary to law.

7. The Court erred as a matter of law in holding that underwriters are entitled by subrogation to recover from insured a proportionate share of recovery without any deduction for legal expenses.

Wherefore defendant prays that the judgment of the United States District Court for the Southern District of New York in said cause be reversed.

Dated, New York, April 19th, 1937.

Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for Defendant, 120 Broadway, New York, N. Y.

[fol. 140] Citation of United Fruit Company omitted in printing.

[fol. 141] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

L 57-273

BOSTON INSURANCE COMPANY, Plaintiff,

against

UNITED FRUIT COMPANY, Defendant

JUDGMENT

The issues joined in this action having regularly come on for trial at a stated term of this court on the 30th day of October, 1936, before the Honorable Robert P. Patterson, United States District Judge, and a jury of one, and the plaintiff appearing by its attorneys, Bigham, Englar, Jones & Houston, and the defendant appearing by its attorneys, Kirlin, Campbell, Hickox, Keating & McGrann, and the allegations and proofs of both sides having been heard and considered, and at the close of the case both sides having moved for direction of a verdict, and after due deliberation the Court having directed a verdict in favor of the plaintiff Boston Insurance Company, for $1,777.29, with interest

from November 28, 1932, and the costs of the said plaintiff having been duly taxed at $32.50, now it is

Ordered and adjudged that the plaintiff Boston Insurance Company, 90 John Street, Borough of Manhattan, New York City, do recover of the defendant United Fruit [fol. 142] Company, Pier 3 North River, Borough of Manhattan, New York City, the sum of $1,777.29, with interest from November 28, 1932, to date, amounting to $456.17 together with $32.50 costs and disbursements amounting in all to the sum of $2,265.96, and that the plaintiff have execution therefor.

Judgment entered this 10th day of March, 1937.

Charles Weiser, Clerk.

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION AND ORDER ALLOWING APPEAL OF BOSTON INSURANCE COMPANY

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The above-named plaintiff, the Boston Insurance Company, feeling aggrieved by the judgment of the District [fol. 143] Court of the United States for the Southern District of New York, entered herein on the 10th day of March 1937, hereby appeals from said judgment to the United States Circuit Court of Appeals for the Second Circuit, and prays that said appeal be allowed for the reasons specified in the assignment of errors filed with this petition, and also prays for an order allowing petitioner to prosecute said appeal, and that a transcript of the record, papers and proceedings on which the said judgment was made, may be duly authenticated and sent to the United States Circuit Court of Appeals for the Second Circuit; and that a citation be issued as directed by law.

Dated, New York, April 3, 1937.

Bigham, Englar, Jones & Houston, Attorneys for Petitioner-Plaintiff, 99 John Street, New York, N. Y.

The above appeal is hereby allowed.

Dated, New York, April 3rd, 1937.

Alfred C. Coxe, U. S. D. J.

[fol. 144] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL OF BOSTON INSURANCE COMPANY

SIRS:

Please take notice that the plaintiff above named, Boston Insurance Company, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the judgment entered herein in the Office of the Clerk of the United States District Court for the Southern District of New York on the 10th day of March, 1937, in favor of the said plaintiff and against the defendant in the sum of $2,265.96; and the said plaintiff appeals from each and every part of said judgment, as well as from the whole thereof.

Dated, New York, April 3, 1937.

Yours, &c., Bigham, Englar, Jones & Houston, Attorneys for Plaintiff, 99 John Street, New York, N. Y.

[fol. 145] To Messrs Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for Defendant, 120 Broadway, New York, N. Y.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS OF BOSTON INSURANCE COMPANY

Now comes the plaintiff, Boston Insurance Company, by Bigham, Englar, Jones & Houston, its Attorneys, and files the following assignment of errors:

1. The Court erred in directing a verdict in favor of the plaintiff for only $1,777.29, with interest only from November 28, 1932.

2. The Court erred in not directing a verdict in favor of the plaintiff for such proportion of the entire net recovery [fol. 146] from the Government in the collision suit as the sum insured by plaintiff, and paid to defendant by plaintiff, bears to the agreed valuation of the S. S. "Almirante" as fixed by the policy issued by plaintiff to defendant.

3. The Court erred in not directing a verdict in favor of the plaintiff for the full amount of its proportionate share in the entire net recovery of $1,461,668.49, namely, $36,-541.71, less $14,037.71, which plaintiff has already received, or a net amount of $22,504.00, together with interest from November 28, 1932 on said unpaid balance of $22,504.00.

4. The Court erred in not directing a verdict in favor of plaintiff for at least an amount which, added to the payment it has already received, would constitute full and complete reimbursement in respect of plaintiff's loss, namely, the repayment of the sum of $15,815.00 made by plaintiff to defendant on December 16, 1918, plus interest from that date for the period during which plaintiff was deprived of the use of this sum, less the $14,037.71 received by plaintiff on November 28, 1932.

5. The Court erred in refusing to direct a verdict in favor of the plaintiff for at least the full amount of its payment in 1918, namely, $15,815.00, with interest thereon from December 16, 1918, less the amount received by plaintiff in 1932, namely, $14,037.71, together with interest on $1,777.29 from November 28, 1932.

6. The Court erred in denying plaintiff's motion to set aside the verdict directed in favor of plaintiff for $1,777.29 [fol. 147] with interest from November 28, 1932, on the ground that it was contrary to law.

7. The Court erred in denying plaintiff's motion to set aside the verdict directed in favor of plaintiff for $1,777.29 with interest from November 28, 1932, on the ground that it was contrary to the evidence.

Wherefore, plaintiff prays that the judgment of the United States District Court for the Southern District of New York be reversed, and for such other and further relief as to the Court may seem just and proper.

Dated, New York, April 2, 1937.

Bigham, Englar, Jones & Houston, Attorneys for Plaintiff, 99 John Street, New York, N. Y.

[fol. 148] Citation of Boston Insurance Company omitted in printing.

[fol. 149] IN UNITED STATES DISTRICT COURT

L 57-273

[Title omitted]

PETITION AND ORDER ALLOWING APPEAL OF UNITED FRUIT COMPANY

The defendant, United Fruit Company, being aggrieved by the decision and judgment of the District Court of the Southern District of New York, which judgment was entered herein in the office of the Clerk of this Court on the 10th day of March, 1937 in favor of the plaintiff in the sum of $2,265.96, hereby prays that an appeal be allowed to the [fol. 150] United States Circuit Court of Appeals for the Second Circuit.

Dated, New York, April 19, 1937.

United Fruit Company, by Kirlin, Campbell, Hickox, Keating & McGrann, Its Attorneys. By Cletus Keating.

ALLOWANCE OF APPEAL

Upon the foregoing petition, it is

Ordered that the appeal herein prayed for by the defendant, United Fruit Company, be and the same hereby is allowed.

Dated, New York, April 22nd, 1937.

Robert P. Patterson, U. S. D. J.

[fol. 151] IN UNITED STATES DISTRICT COURT

L 57-273

[Title omitted]

NOTICE OF APPEAL OF UNITED FRUIT COMPANY

SIRS:

Please take notice that the defendant, United Fruit Company, hereby appeals to the United States Circuit Court

of Appeals for the Second Circuit, to be held in the Court Rooms in the United States Court House, Borough of Manhattan, City of New York, from the judgment entered herein on the 10th day of March, 1937, in favor of the plaintiff in the sum of $2,265.96 and against the defendant, and from each and every part of said judgment as well as the whole thereof.

Dated, New York, April 19, 1937.

Yours, etc., Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for Defendant, Office and Post Office Address, 120 Broadway, Borough of Manhattan, City of New York.

[fol. 152] To Bigham, Englar, Jones & Houston, Esqs., Attorneys for Plaintiff, 99 John Street, Borough of Manhattan, City of New York. Charles Weiser, Esq., Clerk.

IN UNITED STATES DISTRICT COURT

L 57-273

[Title omitted]

ASSIGNMENT OF ERRORS OF UNITED FRUIT COMPANY

Now comes the defendant United Fruit Company, by Kirlin, Campbell, Hickox, Keating & McGrann, its attorneys, and files the following assignment of errors:

1. The Court erred in directing a verdict in favor of the plaintiff for $1,777.29, with interest from November 28, 1932.

2. The Court erred in not directing a verdict in favor of the defendant dismissing the complaint.

[fol. 153] 3. The verdict returned on the decision of the Trial Court is contrary to the evidence submitted on the trial of the said cause and is not supported by it.

4. The judgment entered by the Trial Court on the verdict is contrary to the evidence submitted upon the trial and is erroneous in law.

5. The Court erred in denying defendant's motion to set aside the verdict directed in favor of plaintiff for

$1,777.29, with interest from November 28, 1932, on the ground that it was contrary to the evidence.

6. The Court erred in denying defendant's motion to set aside the verdict directed in favor of plaintiff for $1,777.29, with interest from November 28, 1932, on the ground that it was contrary to law.

7. The Court erred as a matter of law in holding that underwriters are entitled by subrogation to recover from insured a proportionate share of recovery without any deduction for legal expenses.

Wherefore defendant prays that the judgment of the United States District Court for the Southern District of New York in said cause be reversed.

Dated, New York, April 19th, 1937.

Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for Defendant, 120 Broadway, New York, N. Y.

[fol. 154] Citation of United Fruit Company omitted in printing.

[fol. 155] IN UNITED STATES DISTRICT COURT

L 57—271, L 57—272, L 57—273

[Titles omitted]

STIPULATION AS TO EXHIBITS

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the fol-
[fol. 156] lowing exhibits may be omitted from the record on appeal herein; that the same may be used by either party on the argument of this appeal and may be handed up to the Court by either party on said argument:

Exhibits 1, 2, 3 and 4 annexed to Plaintiffs' Exhibit #2. (Same as Exhibits 1, 2, 3 and 4 annexed to Plaintiffs' Exhibit #1.)

Exhibits 1, 2, 3 and 4 annexed to Plaintiffs' Exhibit #4. (Same as Exhibits 1, 2, 3 and 4 annexed to Plaintiffs' Exhibit #1.)

Plaintiffs' Exhibit #9. Recovery Statement.
Plaintiffs' Exhibit #11—Edwards v. Motor Union, 1922, 2 K. B. D. 249.

Dated, New York, June 17, 1937.

Bigham, Englar, Jones & Houston, Attorneys for Plaintiffs-Appellants and Appellees. Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for Defendant-Appellee and Appellant.

[fol. 157] IN UNITED STATES DISTRICT COURT

L 57—271, L 57—272, L 57—273

[Titles omitted]

STIPULATION AND ORDER SETTLING AND FILING BILL OF EXCEPTIONS

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the fore-
[fol. 158] going contains all the testimony and exhibits material to the appeal herein, except as shown in the stipulation at folios 463-8, and that the same may be settled and ordered on file as the bill of exceptions herein.

Dated, New York, June 17, 1937.

Bigham, Englar, Jones & Houston, Attorneys for Plaintiffs-Appellants and Appellees. Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for Defendant-Appellee and Appellant.

So ordered. Robert P. Patterson, U. S. District Judge.

June 23, 1937.

[fol. 159] IN UNITED STATES DISTRICT COURT

L 57—271, L 57—272, L 57—273

[Titles omitted]

STIPULATION AS TO RECORD

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court

[fol. 160] in the above-entitled matter as agreed upon by the parties.

Dated, New York, June 17, 1937.

Bigham, Englar, Jones & Houston, Attorneys for Plaintiffs-Appellants and Appellees. Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for Defendant-Appellee and Appellant.

[fols. 161-162] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 163] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1937

Argued Oct. 19, 1937. Decided Nov. 8, 1937

Nos. 50–52

ÆTNA INSURANCE COMPANY, Plaintiff-Appellant-Appellee,

v.

UNITED FRUIT COMPANY, Defendant-Appellee-Appellant

UNION MARINE & GENERAL INSURANCE CO., LTD., Formerly Union Marine Insurance Company, Ltd., Plaintiff-Appellant-Appellee,

v.

UNITED FRUIT COMPANY, Defendant-Appellee-Appellant

BOSTON INSURANCE COMPANY, Plaintiff-Appellant-Appellee,

v.

UNITED FRUIT COMPANY, Defendant-Appellee-Appellant

Appeal from the District Court of the United States for the Southern District of New York

Before L. Hand, Swan, and Augustus N. Hand, Circuit Judges

Appeals by both parties from judgments for the plaintiffs in three actions at law for money had and received.

D. Roger Englar, of New York City, for plaintiffs.

Cletus Keating, of New York City, for defendant.

L. HAND, Circuit Judge:

The three actions here on appeal were brought by separate underwriters to recover money received by the insured in payment of a judgment recovered by it in a suit against the United States; they are based upon the theory that the [fol. 164] payment was in the nature of salvage, and was for the account of both underwriters and owner. The question is on what principle it should be divided. The facts are as

follows. In 1918 the three plaintiffs, with a number of other underwriters, issued "valued hull" policies upon the defendant's ship, "Almirante"; the agreed value was $632,610—known at the time to be far less than the actual value of the ship;—the total insurance was $582,002.25, divided about equally between American and English insurers. Thus the defendant was a coinsurer for about $50,000, and was in addition undercovered in the event of a total loss. To protect itself again the second risk, it took out additional English hull insurance, "P. P. I." (Policy Proof of Interest) amounting to $141,614, and other English "P. P. I." policies not strictly hull insurance, but upon losses incidental to the total loss of the ship. All these "P. P. I." policies created no obligation; they were "honor" policies, payable only at the pleasure of the insurer, and they expressly surrendered all rights of subrogation. On Sept. 19, 1918, the "Almirante" was sunk and became a total loss as the result of a collision with the S. S. "Hisko," a vessel owned by the United States. The hull underwriters paid the full amount of their coverage to the defendant, and so did the "P. P. I." underwriters. Thereupon both the defendant and the hull underwriters joined in retaining attorneys to pursue the United States for the fault of the "Hisko." They secured the passage of a special act of Congress authorizing a suit, which finally resulted in a judgment for $1,761,693.02, made up of the true value of the "Almirante," $1,750,000, and of her equipment, supplies and the like, $11,693.02. This judgment was paid on July 26, 1932, and the defendant undertook to make distribution of the proceeds. To that end it engaged the well known marine insurance agents, Johnson & Higgins, who prepared a "recovery statement," in which they apportioned the expenses (for the most part the fees of attorneys) between the defendant and the hull underwriters in the proportion of four to one, and allotted to the hull underwriters their original payments less their share of the expenses, but without interest, for the defendant had recovered no interest against the United States. This adjustment the English underwriters accepted, but the Americans protested; first, because they should not have been compelled to bear any part of the expenses of the recovery; and second, because, although they had paid the defendant in 1918, they received no interest for the delay, except what the money had earned after the defendant collected the judgment. Further, though not pressing the point

in this court, they reserved against a possible appeal to the Supreme Court a claim to the whole recovery. The judge felt himself bound by The Livingstone, 130 F. 746 (C. C. A. 2), not to deduct from the plaintiff's recovery any part of the expenses of the suit against the United States, but he thought that the principle of that decision did not extend to the allowance of interest when none had been recovered. Our decision must depend upon the effect to be given to the agreed value in a "valued hull policy." On the one hand the provision might be understood as meaning that in all future relations between owner and underwriter, however arising, the stipulated amount must be taken as the actual value of the ship; on the other hand it might be understood as meaning only that the underwriters should not be called upon to pay more than the agreed amount, and that they should not be free to assert that the vessel was worth less, when sued upon their policies. Some courts have taken the first view as to the hull policies, though none have ever done so either as to cargo policies, or in any but marine insurance.

The plaintiffs admit as much, and stand upon the doctrine as an exception so well established as to be implied in the terms of all hull policies; in addition they defend it in principle. They argue that since the hull underwriter of a "valued" policy must pay all partial losses in full, unlike any other insurer (International Navigation Co. v. Atlantic Mutual Ins. Co. [D. C.] 100 F. 304, 318; Id., 108 F. 987 [C. C. A. 2]; Aitcheson v. Lohre, L. R. 4 App. Cas. 755), he ought not to be obliged to let in the owner as a coïnsurer when there is a total loss. It is true that the rule has become settled in cases of "valued" hull policies that the underwriter pays partial losses in full, and it is also true that consistently with the principles of other insurance he ought not to be so charged. Howeyer, the reason is not that the agreed value is taken as an estoppel, but that partial [fol. 165] losses in the case of hulls commonly result in repairs, the injured hull not being appraised like cargo. Gulf Refining Co. v. Atlantic Mutual Ins. Co., 279 U. S. 708, 713, 49 S. Ct. 439, 73 L. Ed., 914. That this is the real explanation is confirmed by the fact that the rule is not applied even in hull cases when the claim does not result from repairs. Pitman v. Universal Marine Co., L. R. 9 Q. B. D. 192; S. S. "Balmoral" Company v. Marten (1902) App. Cas. 511. The argument does not therefore seem to us con-

vincing. The plaintiffs next argue that when the owner has covered his excess value with "P. P. I." policies not entitled to subrogation, it would be unjust to the hull underwriters if he is allowed to share with them any recovery against tort-feasors. He should not be treated as a coïnsurer as to the excess value in dividing that recovery if he has been indemnified pro tanto by "P. P. I." payments. Indeed, it may well be that such payments should be bought into hotchpot in ascertaining the total amount recovered, and if they and the recovery together cover the loss, the hull underwriters will recoup in full; but if there be a rump left over, they should have no claim upon that; the venture was not theirs and the owner has merely had a windfall, owing to the peculiar nature of the "P. P. I." policies. Finally we are not convinced by the argument of Brown, J. in The St. Johns (D.C.) 101 F. 469, 473, that since in cases of full insurance the hull underwriter is wholly indemnified, the owner should not complain of the same result when he chooses to undervalue his ship and so to save premiums. That reasoning might indeed prevail in cases where the underwriter had been led to suppose that the agreed value was the full value, but that is never the case; at least it was not the case here. When it is not, there can be no inequity in letting in the owner as coinsurer, unless a contrary stipulation is to be implied in the policy; for the underlying understanding in any sort of insurance is that the insured is to be made whole at the insurer's expense; not that the insurer is to be preferred.

As to authorities, North of England Association v. Armstrong, L. R. 5 Q. B. 244 (1870), supports the plaintiffs; supports them even in their claim to the whole recovery, though that point was not actually decided. It held flatly that the agreed value was an estoppel between the parties whenever value became relevant in their legal relations. That result was thought to follow upon the privilege of an underwriter, who has paid a total loss, to take over the wreck, to raise and repair it, and to make such profit from it as he can. Recovery against a tort-feasor stands precisely like the wreck, the court said; it is a substitute for the ship and the underwriter is as much entitled to it. This argument seems to us fallacious. In the first place, the owner often in fact abandons the wreck, though the underwriter's privilege does not in law depend upon it; and so far as we are advised, no case has arisen in which an underwriter has actually profited

out of the wreck, when the owner did not abandon. But assuming that in such a case he might retain any profit, that is irrelevant here. An owner who receives payment of a total loss and who, even though he does not expressly abandon the wreck, allows the underwriter at his own cost to raise and restore it, may well have no equitable claim to any resulting profit. But an owner who, not being covered by his hull insurance, actively prosecutes a right of action against a tort-feasor—especially when, as here, he does it in conjunction with his underwriter—shows as plainly as possible that he means to assert an interest in it, which would be grossly unjust to give to the underwriter after the owner has won. Yet, unless one is prepared to go so far as this, the reasoning of North of England Association v. Armstrong, supra (L. R. 5 Q. B. 244), will not serve, for there is no antecedent ground for saying that the agreed value must be an estoppel for all purposes. Lord Blackburn in Burnand v. Rodocanachi, L. R. 7 App. Cas. 333, 342, plainly disapproved the decision, and although Scrutton, J. felt bound to follow it in Thames & Mersey Maine Ins. Co. v. British & Chilean S. S. Co., (1915) L. R. 2 K. B. 214, he too appears to have had doubts as to its correctness (p. 221). On the other hand, Brown, J. in The St. Johns, supra (D.C.) 101 F. 469, not only followed it, though in a case where the underwriter made no actual profit, but was merely preferred to the owner, but justified it for the reasons we have already stated. In The Livingstone, supra, 130 F. 746, we were pre-
[fol. 166] sented with a claim for the whole recovery against a tort-feasor. It was a legitimate corollary upon North of England Association v. Armstrong, supra (L. R. 5 Q. B. 244), inescapable if the ratio decidendi of that decision was recognized at all, for the mid ground which the plaintiffs suggest —that the underwriter should be merely preferred to the owner—has no warrant in law. Unless his right of subrogation gives him the recovery in toto, he must let in the owner as coinsurer, as in other similar situations. We refused to recognize the reasoning of that decision; we refused to let the underwriter profit out of the venture. We said nothing more; we did not put him in a preferred position for it was not necessary; the language relied upon to that effect on page 751 of 130 F., was certainly not uttered with any such intent. Nevertheless, although the point was not discussed and probably was not considered originally, it is true that

the mandate was so drawn as to repay to the underwriters their full payments without deducting anything for expenses. Moreover, when this was called to our attention upon petition of rehearing, we refused to amend the mandate. For this reason the plaintiffs say that we accepted the general principle of North of England Association v. Armstrong, supra (L. R. 5 Q. B. 244), and that we only limited it by denying any profit to the underwriter. We are unwilling to accept a decision upon a point not discussed in the opinion and of relatively small consequence anyway, as having the full force of a precedent, especially when to do so is to compromise the only theory on which the decision in chief could rest. It is scarcely necessary more than to allude to the kind of approval supposed to have been given to North of England Association v. Armstrong, supra (L. R. 5 Q. B. 244) in the Potomac, 105 U. S. 630, 635, 26 L. Ed. 1194.

There remains, however, the question whether, regardless of how we should decide the point were it before us for the first time, we should assume that the rule was written into the policies sub silentio as part of the settled law. Whatever be the case in England, there is no ground for supposing it settled here. The St. Johns, supra (D. C.) 101 F. 469, was indeed cited in The Livingstone, supra (C. C. A.) 130 F. 746, though it is not clear for what purpose; but its reasoning was necessarily overruled, and although unquestionably it has the great authority of the judge who decided it, we cannot regard it as unimpaired. We do not forget that we are not to depart from English maritime law, when we can help it (The Eliza Lines, 199 U. S. 119, 128, 26 S. Ct. 8, 50 L. Ed. 115, 4 Ann. Cas. 406; Queen Ins. Co. v. Globe & R. F. Ins. Co., 263 U. S. 487, 493, 44 S. Ct. 175, 68 L. Ed. 402), but North of England Association v. Armstrong, supra (L. R. 5 Q. B. 244), has never been passed on by an appellate court, was questioned by a great judge, and followed by another with doubt and because he was bound by its authority. All this does not in our opinion make up such a uniform body of authority that we must assume the doctrine as an implied term in American hull policies. Besides, although we are not advised of the circumstances in which the "recovery statement" was made, we do know that it was prepared by persons especially versed in such questions, and they at any rate followed the orthodox rule.

No question has been raised in the briefs as to the correctness of the "statement," in case the defendant is to be regarded as coinsurer to the extent of the actual value, as opposed to the agreed. Moreover, the plaintiffs' assignments of errors claim specifically only that they should have had all the recovery, or at least interest upon their payments; otherwise they only assign generally that the decision was wrong. Therefore, no other questions can be raised; and indeed, as we have just said, we do not understand that any others are intended to be raised.

Judgment affirmed in the plaintiffs' appeals and reversed on the defendant's appeal; complaints dismissed.

[fol. 167] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 15th day of November, one thousand nine hundred and thirty-seven.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

ÆTNA INSURANCE COMPANY, Plaintiff-Appellant,

vs.

UNITED FRUIT COMPANY, Defendant-Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed on the plaintiff's appeal and reversed on the defendant's appeal, with costs to the defendant, and cause remanded with instructions to dismiss the complaint.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 168] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Ætna Insurance Company vs. United Fruit Company. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 15, 1937. William Parkin, Clerk.

[fol. 169] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 15th day of November, one thousand nine hundred and thirty-seven.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

UNION MARINE & GENERAL INSURANCE CO., LTD., Plaintiff-Appellant,

vs.

UNITED FRUIT COMPANY, Defendant-Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed on the plaintiff's appeal and reversed on the defendant's appeal, with costs to the defendants, and cause remanded with instructions to dismiss the complaint.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 170] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Union Marine & General Insurance Co., Ltd., vs. United Fruit Company. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 15, 1937. William Parkin, Clerk.

[fol. 171] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 15th day of November, one thousand nine hundred and thirty-seven.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

BOSTON INSURANCE COMPANY, Plaintiff-Appellant,

vs.

UNITED FRUIT COMPANY, Defendant-Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed on the plaintiff's appeal and reversed on the defendant's appeal, with costs to the defendant, and cause remanded with instructions to dismiss the complaint.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 172] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Boston Insurance Company vs. United Fruit Company. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 15, 1937. William Parkin, Clerk.

[fol. 173] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 172, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Ætna Insurance Company, Plaintiff-Appellant, against United Fruit Company, Defendant-Appellant (and two other cases), as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this thirteenth day of January, in the year of our Lord one thousand nine hundred and thirty-eight, and of the Independence of the said United States the one hundred and sixty-second.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 174] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1937

No. 773

ORDER ALLOWING CERTIORARI—Filed March 14, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 175] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1937

No. 774

ORDER ALLOWING CERTIORARI—Filed March 14, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 176] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1937

No. 775

ORDER ALLOWING CERTIORARI—Filed March 14, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File Nos. 42,254, 42,255, 42,256. U. S. Circuit Court of Appeals, Second Circuit. Term No. 773. Ætna Insurance Company, Petitioner, vs. United Fruit Company. Term No. 774. Union Marine & General Insurance Company, Ltd., formerly Union Marine Insurance Company, Ltd., petitioner, vs. United Fruit Company. Term No. 775. Boston Insurance Company, petitioner, vs. United Fruit Company. Petition for writs of certiorari and exhibit thereto. Filed February 8, 1938. Term Nos. 773, O. T., 1937, 774, O. T., 1937, 775, O. T., 1937.

FILE COPY

Office - Supreme Court, U. S
FILED
FEB 8 1938
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 773-775

AETNA INSURANCE COMPANY,
Petitioner,

—against—

UNITED FRUIT COMPANY,
Respondent.

UNION MARINE & GENERAL INSURANCE COMPANY, LTD., formerly Union Marine Insurance Company, Ltd.,
Petitioner,

—against—

UNITED FRUIT COMPANY,
Respondent.

BOSTON INSURANCE COMPANY,
Petitioner,

—against—

UNITED FRUIT COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

D. ROGER ENGLAR,
T. CATESBY JONES,
OSCAR R. HOUSTON,
MARTIN DETELS,
Attorneys for Petitioners.

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Supreme Court of the United States

OCTOBER TERM, 1937.

No.————

AETNA INSURANCE COMPANY,

Petitioner,

—against—

UNITED FRUIT COMPANY,

Respondent.

UNION MARINE & GENERAL INSURANCE COMPANY, LTD., formerly Union Marine Insurance Company, Ltd.,

Petitioner,

—against—

UNITED FRUIT COMPANY,

Respondent.

BOSTON INSURANCE COMPANY,

Petitioner,

—against—

UNITED FRUIT COMPANY,

Respondent.

Petition.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States.

The petition of Aetna Insurance Company, Union Marine and General Insurance Company and Boston Insurance Company, for writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit, respectfully shows:

Statement of Matter Involved.

The petitioners are underwriters who insured the steamship "Almirante", and who paid the full amount insured under their policies when the vessel was sunk on September 6, 1918, in collision with the steamship "Hisko", owned and operated by the United States Government. The respondent was the owner of the "Almirante". These actions were brought by the petitioners in the United States District Court for the Southern District of New York, on the law side, to recover certain monies which the owner of the "Almirante" had recovered from the United States Government, as owner of the "Hisko", and which the plaintiff underwriters claim on the principle of subrogation.

The material facts are all admitted in the pleadings or stipulated by the parties, so that the cases involve a pure question of law.

For the purpose of this petition, the three cases will be treated as one. These cases are representative of a large number of similar claims, and the reason for bringing three suits was to present three typical situations depending on the form of receipt, if any, taken by the various insurance companies interested. In certain cases the respondent relied on the form of receipt taken, but as neither of the lower courts considered the receipts material, we need not discuss them here.

The defendant originally purchased the "Almirante" in 1914 for $400,000. In May, 1918, she was insured with various underwriters in the United States and England, including these plaintiffs, under policies of hull insurance in which she was valued at the sum of $632,610.

In addition to this hull insurance the owner obtained in London various "P. P. I."* or "honor" policies aggregating £65,105, against total loss only of the "Almirante". The interest insured in these policies is variously described as "increased value", "disbursements", etc., but the defendant's answers specifically state (in paragraph 10) that these policies were "upon the SS. 'Almirante' for increased valuation" (R., p. 13, fol. 39; p. 25, fol. 75; p. 37, fol. 111). These policies were stated to be without benefit of salvage; admittedly they were not legally enforceable, and payments under such policies gave rise to no rights of subrogation. English Marine Insurance Act of 1906, Sec. 4; *Edwards & Co.* v. *Motor Union Insurance Co.*, 1922, 2 K. B. 249 (R., pp. 46, 47; Exhibit 10, p. 96; see opinion of Circuit Court of Appeals, R. 164).

The respondent not only concedes but alleges that the foregoing insurances were placed "in accordance with the customary practice" (R., pp. 13, 25, 37, fols. 39, 75, 111).

After the "Almirante" was sunk in collision in 1918, the defendant collected a total loss from underwriters who insured the following sums:

American Hull Underwriters		$284,673.00
English Underwriters:		
Hull	£61,305.	
P. P. I.	65,105.	
	£126,410.	
(at exchange of $4.75-¾; R., p. 89, fol. 265)		601,395.57
Total		$886,068.57

* These letters stand for "policy proof of interest".

After a considerable lapse of time an Act of Congress was passed, permitting suit to be brought against the United States, as owner of the "Hisko". In that suit, which was not concluded until 1932, the defendant recovered for the loss of the "Almirante", including stores and sundries, $1,763,013.38* (Recovery Statement Exhibit 9, p. 42). The expenses of the litigation amounted to upwards of $300,000, but after deducting these expenses and adding a small item of bank interest there remained a net recovery of $1,463,997.09.

Accordingly, after collecting the judgment in the collision suit the defendant had in hand the following sums in respect of the loss of the "Almirante":

Collected from American Hull Underwriters		$284,673.00
From English Hull Underwriters	£61,305	
From English P. P. I. Underwriters	65,105	
	£126,410	601,395.57
Carried by respondent as self-insurer		50,609.00**
Net recovery in collision suit		1,463,997.09
Total		$2,400,674.66

* This includes an item of $1320.36, which it may be claimed was not covered by the policy, but that amount is too small to have any significance in this connection.

** As to this item (being the difference between the amount insured and the agreed value), the respondent was correctly treated just like any other hull underwriter (Recovery Statement, Exhibit 9, p. 44). See in this connection note on page 33 of petitioner's brief attached hereto.

All of the foregoing figures appear in the recovery statement issued by Johnson & Higgins, the defendant's brokers, under date of November 22, 1932, Exhibit 9, any part of which it was stipulated could be offered in evidence by either party as prima facie evidence of any of the facts stated therein (R., p. 62, fols. 186; p. 63, fol. 187; p. 77, fol. 229; p. 86, fol. 256). The figures are summarized in Exhibit 12, which is a recapitulation offered at the trial (R., pp. 51, 97).

Out of these funds the shipowner partially reimbursed its underwriters, as follows (Exh. 12, R., pp. 97-8):

Paid to American Hull Underwriters	$ 252,681.36
Allocated to respondent as self-insurer	44,921.54
Paid to English Hull Underwriters	184,197.35
Paid to English P. P. I. Underwriters	85,999.64
Retained by respondent	1,832,874.77
Total	$2,400,674.66

It will be noted that a substantial sum was paid to the P. P. I. underwriters, who admittedly had no legal right to any part of the fund. Owing to the fact that most of the P. P. I. insurance was written by the same English underwriters who insured the hull (R., p. 99, Exh. 13), and the remainder was largely written by companies which were affiliated with English hull underwriters by stock ownership (R., p. 56, fols. 167-8), this gratuitous payment to P. P. I. underwriters was, in effect, a payment to the English hull underwriters and, as a result, English hull underwriters obtained a much more favorable settlement than American hull underwriters. Indeed, in some

cases this disparity applied to different policies written by the same company. Some of the English companies wrote dollar policies at their American branches in New York, and sterling policies at their home offices in London (R., p. 53, fol. 159; p. 54, fol. 160). In these cases the English home office received a more favorable settlement than the American branch.

The final result was that the American hull underwriters have received back about 89% of what they had paid out fourteen years before. Although the net recovery from the "Hisko" was considerably more than twice the valuation fixed in the hull policies, the American hull underwriters did not even receive the full amount of their payments, to say nothing of interest for the fourteen years that had intervened. The sum retained by the respondent ($1,832,874.77, *supra,* p. 5) was nearly three times the valuation in the hull policies and about $70,000 in excess of the value of the vessel as fixed by the courts, even after the respondent had paid to the English P. P. I. underwriters a large sum (nearly $86,000) which was not legally due.

The Issue Presented.

The sole issue presented in the present litigation is the effect of a valuation clause in a marine insurance policy on a vessel. In *Gulf Refining Co.* v. *Atlantic Mutual Insurance Co.,* 279 U. S. 708, this Court had occasion to consider the effect of an agreed valuation in a marine policy. In that case, however, the policy was on cargo, and this Court pointed out the different effect which is given to a valuation clause in the cases of hull and cargo policies respectively. As explained in that opinion, the assured under a valued cargo policy is, in effect, a co-insurer in respect of any excess over the agreed valuation.

A shipowner, however, recovers his loss in full under a hull policy, without regard to the relation between the actual value and the agreed value; so that the element of coinsurance is wholly lacking under such policies. For that reason it has always been held, until the decision in the present case, that the valuation in a hull policy is conclusive for all purposes as between the parties. In the *Gulf Refining Co.* case this Court indicated that there might be some question about this rule as applied to general average cases; but any such doubt is removed in the present case by the express terms of the policies (see Petitioners' Brief, *infra*, p. 34). Under these policies it is clear that the actual value of the vessel does not enter into the computation of the loss in any way whatsoever, even in cases of salvage or general average.

Accordingly, these cases present squarely the question whether a valuation which is binding on the underwriters for all purposes is binding on the assured in the matter of apportioning recoveries from third parties. In *Mobile and Montgomery R. Co.* v. *Jurey*, 111 U. S. 584, at pages 594-5, this Court answered this question in the affirmative; and that rule has been uniformly applied in this country ever since.

It is the contention of the petitioners that, under the rule laid down by this Court in the *Jurey* case, they were entitled to full and complete reimbursement, including interest on their respective payments while they were deprived of the use of their funds. The petitioners contend that their right of reimbursement is a first charge on the recovery; and only after their claim has been satisfied can the owner participate in the fund recovered from a third party tort feasor.

Decision of the District Court.

The District Court held that

> "it has become the accepted rule that where the hull insurer has first paid the value agreed on in the policy and the owner later recovers a sum from a third person whose negligence caused or contributed to the loss, the insurer may recoup the net sum so recovered, up to the full amount of the payment under the policy" (R., p. 104-5, fols. 312-3).

The District Court specifically held that the present cases fell squarely within the decision of the Circuit Court of Appeals for the Second Circuit in the case of *The Livingstone,* 130 Fed. 746.

Following the rule as above stated, the District Court gave the plaintiffs judgment for the difference between the amounts they had respectively paid out in 1918 and the amounts they had received back in 1932, without interest.

Cross appeals were taken. The petitioners appealed because they had not been fully reimbursed in accordance with the decision in the *Livingstone* case. The respondent appealed on the ground that the petitioners were entitled to no recovery whatever.

Decision of the Circuit Court of Appeals.

The Circuit Court of Appeals reversed the decision of the District Court and dismissed the complaints, holding that the plaintiffs were not entitled to any recovery whatever. The following are some of the more important features of the opinion of the Circuit Court of Appeals:

It concedes that its decision in the present cases is contrary not only to English law but to its own

decision in *The Livingstone* (*supra*), more than thirty years ago, and to the earlier decision of Judge Addison Brown in *The St. Johns* (101 Fed. Rep. 469).

It suggests that the court did not intend to decide as it did in *The Livingstone,* but that its decision may have been the result of inadvertence.

It does not mention the language used by this Court in the *Jurey* case (quoted, *infra,* p. 14), although that language was quoted in full in the petitioners' brief in the Circuit Court of Appeals.

It declines to recognize the difference between hull and cargo policies pointed out by this Court in the *Gulf Refining Company* case (*supra,* p. 6).

It permits an assured to make a profit out of his loss by refusing to underwriters the full reimbursement to which they are entitled under their right of subrogation.

It concedes that it should not lightly overrule a long-established usage, but finds that there is no such usage on the question involved here. This finding is contrary to the finding of the District Court (R., pp. 104-105, fols. 312-3) and contrary to the record, and is apparently based on the fact that the shipowner's brokers distributed the money as they did (R., p. 168).

A remarkable feature of the opinion below is its frank expression of inability to understand why Judge Brown's decision in *The St. Johns* (101 Fed. Rep. 469) was cited in *The Livingstone* opinion, in view of the fact that

> "its reasoning was necessarily overruled, and although unquestionably it has the great authority of the judge who decided it, we cannot regard it as unimpaired" (R., p. 168).

In *The Livingstone,* the court did not merely cite *The St. Johns,* but referred specifically to certain

pages of the opinion in that case. An examination of those pages discloses that, far from overruling Judge Brown's reasoning, *The Livingstone* adopted his reasoning in its entirety. The lower court's misunderstanding of *The Livingstone* and *The St. Johns* is readily demonstrable from its opinion, and appears to have been a controlling factor in its decision.

State of the Authorities Before the Present Decision.

In 1870 the Court of Queens Bench decided the case of *North of England Insurance Association* v. *Armstrong* (1870), L. R. 5 Q. B. 244. In that case a vessel was insured for £6,000 and valued at that sum, although actually worth £9,000. She was sunk in a collision and the underwriters paid a total loss. Thereafter the owners recovered £5,000 from the owners of the colliding vessel, who were able to limit their liability to that sum. It was held that the underwriters were entitled to the entire recovery. The rule applied in that case has ever since been accepted as settled law in England, and has been part of the statutory law of England since 1906.

> *Thames & Mersey Marine Insurance Co., Ltd., The* v. *British & Chilian Steamship Co.* (1915), 2 K. B. 214;
> *Goole & Hull Steam Towing Co.* v. *Ocean Marine Ins. Co.* (1928), 1 K. B. 589, 593;
> (English) Marine Insurance Act of 1906, Section 79 (1).*

As this Court has pointed out, the English Marine Insurance Act is a codification of the common law. *Standard Marine Insurance Company* v. *Scottish*

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* 6 Edw. 7, c. 41. *A copy of this Act appears as an appendix to all of the recent editions of Arnould on Marine Insurance and Average, and we cite that appendix to the Court for convenience of reference.*

Metropolitan Assurance Company, Ltd., 283 U. S. 284, at page 289.

By way of dictum the court which decided the *Armstrong* case said that the underwriters would have been entitled to the entire recovery even if it had exceeded the amount of their payment. This dictum has been criticized by some of the English courts, but the question to which it refers has never arisen in England.

In 1884 this Court decided the case of *Mobile & Montgomery Railway Co.* v. *Jurey, et al., supra,* in which it cited the *Armstrong* case with approval.

In 1900 Judge Addison Brown, in the United States District Court for the Southern District of New York, decided the case of *The St. Johns,* 101 Fed. Rep. 469, which presented precisely the same question which had been decided in the *Armstrong* case. Judge Brown decided that the valuation in the policy was conclusive and that the underwriters were entitled to the entire recovery, which was less than the amount they had paid under their policies. He cited the *Armstrong* case, and said:

> "The decision in that case has been repeatedly cited by the supreme court with apparent approval and to some extent followed. *The Potomac,* 105 U. S. 630, 634, 26 L. Ed. 1194; *Railway Co.* v. *Jurey,* 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527" (101 Fed. Rep. at p. 476).

With characteristic foresight and caution, however, Judge Brown made it clear that he was adopting only the decision and not the dictum in the *Armstrong* case. He said (101 Fed. Rep. at pp. 474-5):

> "If the amount recoverable from the wrongdoer, after payment of the damage-claims of

> third parties, were in excess of the amount paid by underwriters to the assured, no doubt that excess would belong to the latter; since the insurers' right of subrogation in equity could not extend beyond recoupment or indemnity for the actual payments to the assured."

In 1904 the Circuit Court of Appeals for the Second Circuit decided the case of *The Livingstone* (130 Fed. Rep. 746; certiorari denied 194 U. S. 637) which presented the precise state of facts mentioned in the dictum in the *Armstrong* case, *i. e.,* the recovery was greater than the amount which the underwriters had paid under their policy. The District Court had followed the dictum in the *Armstrong* case and given the underwriters the entire recovery. The Circuit Court of Appeals reversed this decision and held that the underwriters were entitled to full and complete reimbursement before the assured could receive any share of the recovery; but that when the underwriters had been fully reimbursed (*i. e.,* had received the amount of their respective payments with interest), the excess belonged to the assured. In reaching this result the Circuit Court of Appeals followed exactly the reasoning of Judge Addison Brown in *The St. Johns,* notwithstanding its statement in the present case that the reasoning of *The St. Johns* "was necessarily overruled" in *The Livingstone.* In the latter case (at p. 749) the citation of *The St. Johns* refers specifically to pages 474 and 475; and the passage last above quoted from *The St. Johns* begins on page 474 and ends on page 475. This is convincing evidence that the Circuit Court of Appeals followed instead of overruling Judge Brown's reasoning. Even more positive evidence appears, however, from the respective opinions:

Judge Brown said that the rights of the underwriters are limited, because

> "the insurers' right of subrogation in equity could not extend beyond recoupment or indemnity for the actual payments to the assured" (101 Fed. Rep. at p. 475).

The Circuit Court of Appeals said:

> "The doctrine of subrogation has its origin in equity, its purpose is indemnity and its object is attained when the insurer has been fully compensated" (130 Fed. Rep. at p. 749).

It is plain, therefore, that the lower court erred in its statement that *The Livingstone* decision had overruled the reasoning of Judge Brown in *The St. Johns*. The court was equally mistaken in its statement that

> "the mid ground which the plaintiffs suggest—that the underwriters should be merely preferred to the owner—has no warrant in law. Unless his right of subrogation gives him recovery *in toto*, he must let in the owner as co-insurer, as in other similar situations" (R., p. 167).

The position of the plaintiffs did have "warrant in law" to the extent of a very carefully considered opinion by Judge Addison Brown, and a decision to precisely the same effect by the Circuit Court of Appeals for the Second Circuit, both of which have stood unchallenged for more than thirty years. The rule very clearly laid down in those cases was that a hull underwriter who has paid a total loss under a valued policy is entitled to full reimbursement out of any recovery from third party tort feasors; but that as the doctrine of subrogation is an equitable doctrine, it cannot be pursued to the point of giving the underwriter a profit out of the transaction.

The rule laid down in the *Livingstone* decision by the Circuit Court of Appeals for the Second Circuit, has been adopted in the Sixth and Ninth Circuits and is still law in those Circuits. *Brown* v. *Merchants Marine Insurance Company,* 152 Fed. Rep. 411; *Federal Insurance Company* v. *Detroit Fire & Marine Insurance Company,* 202 Fed. Rep. 648. In the *Brown* case the vessel was valued at $75,000 and was actually worth $140,000, but the owner did not share in the recovery. The *Livingstone* was cited with approval. In the *Federal Insurance Company* case, both the *Livingstone* and the *St. Johns* were cited, and it appears that the rule of the *St. Johns* was definitely approved and adopted.

THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRITS:

(1) The rule of the *Livingstone* has been adopted in at least two other Circuits, and the overruling of that case by the court which decided it creates a direct conflict in the law, as administered in the different Circuits, on the question what effect is to be given to the valuation in a policy of hull insurance.

Brown v. *Merchants Marine Insurance Company,* 152 Fed. Rep. 411;

Federal Insurance Company v. *Detroit Fire & Marine Insurance Company,* 202 Fed. Rep. 648.

(2) The decision of the Circuit Court of Appeals is directly contrary to a rule of law stated by this Court more than fifty years ago in the case of *Mobile and Montgomery R. Co.* v. *Jurey,* 111 U. S. 584. In that case (at pp. 594-5) this Court said:

"Insurers of a ship which has been run down

> and sunk by the fault of another ship, are, upon their payment of a total loss, subrogated to the right of the insured to recover therefor against the owners of the latter vessel, and if their policy was a valued one, their payment of this value will give them the whole *spes recuperandi,* and the right to the whole damages, though the insured vessel was, in fact, worth a larger sum than the valuation named in the policy. *North of England Ins. Association* v. *Armstrong,* L. R. 5 Q. B. 244. See, also, *Clark* v. *Wilson,* 103 Mass. 219, 227."

As pointed out above (*supra,* p. 11) this language was relied on by Judge Brown in deciding the case of the *St. Johns;* and Judge Brown's decision in the *St. Johns* was in turn relied upon by the Circuit Court of Appeals for the Second Circuit in deciding the *Livingstone.*

(3) The decision of the Circuit Court of Appeals overrules the decision of Judge Addison Brown in *The St. Johns* case, *supra,* where he followed the *Armstrong* case in reliance, to a considerable extent, on the approval of that case by this Court.

The decision of the Circuit Court of Appeals also overrules its own decision in *The Livingstone* which was, in turn, based upon the decision of Judge Addison Brown in *The St. Johns.*

In treating the respondent as a "coinsurer" in respect of the excess of actual value over agreed value, the Circuit Court of Appeals declines to recognize the well-established distinction between hull and cargo policies which this Court pointed out in *Gulf Refining Co.* v. *Atlantic Mutual Ins. Co.,* 279 U. S. 708, at page 713. In that case this Court twice referred to the case

of *International Navigation Co.* v. *Atlantic Mutual Insurance Company,* 100 Fed. Rep. 304, where (at pp. 317 to 326) Judge Addison Brown demonstrated that in a cargo policy the *insured* value does not affect the amount of the loss payable; whereas in a hull policy the *actual* value does not affect the amount of the loss payable. The *International Navigation Co.* case was affirmed on the opinion below, 108 Fed. Rep. 987; and certiorari was denied, 181 U. S. 623. See also *International Nav. Co.* v. *Sea Ins. Co. Ld.,* 124 Fed. Rep. 93; affirmed, 129 Fed. Rep. 13.

(4) Beginning with the *Armstrong* case and coming on down through *The Livingstone,* there is an unbroken line of authorities in the United States and England covering a period of nearly seventy years, all of which support the claim of plaintiffs to full reimbursement in the present case. We submit that a doctrine so long and so unanimously applied should not now be changed, and certainly should not be overruled by a court which (as clearly appears from its opinion) misinterpreted the reasoning of the earlier decisions.

(5) For many years shipowners and their underwriters have believed the law to be well settled in accordance with the decision in the *Armstrong* case, and the statement of this Court in the *Jurey* case. When later the great authority of Judge Addison Brown was supplemented by the decision of the Circuit Court of Appeals for the Second Circuit in *The Livingstone,* and certiorari was denied by this Court (194 U. S. 637), it was thought that the question was no longer open. The customary methods of writing hull insurance both here and in England, are based upon the law as laid down in the decisions above mentioned (see Petitioners' Brief, *infra,* pp. 29-36).

We submit that a rule which has been so long in force and so generally accepted, should be changed, if at all, only by legislative action which would not disturb rights already vested.

(6) In the interest of economy shipowners take out certain basic insurance, referred to as hull insurance, on a low valuation; and take out certain supplemental insurance against total loss only, commonly referred to as "disbursements" or "P. P. I." insurance, for which a much lower premium is charged. This latter insurance is without benefit of salvage. The two sets of policies are so drawn as to give the assured complete protection at much less cost than he would incur if he covered the full value of his vessel with the ordinary form of hull insurance (Petitioners' Brief, *infra,* p. 34). The only advantage which the low valuation gives to the hull underwriter is taken from him by the decision below,—*i. e.* the improved prospect of obtaining full reimbursement from third party tort feasors. The waiver by the "disbursements" or "P. P. I." underwriters of their right to salvage was obviously intended to protect the hull underwriter in the rights secured to him under the *Armstrong* decision and the ruling of this Court in the *Jurey* case. Under the decision of the Circuit Court of Appeals, however, the assured is allowed to make a profit out of his loss by denying to underwriters their right of full subrogation. The court below recognized this difficulty created by its decision, but said that where this situation arises "the owner has merely had a windfall, owing to the peculiar nature of the 'P. P. I.' policies". This means that a method of conducting business which has been carefully planned in the light of established principles of law, and which produces just and sensible results when those principles are

applied, has been changed into a series of gambling transactions by the lower court's refusal to apply well-settled law.

(7) The importance of the decision below is not limited to occasional cases which present extraordinary values or other abnormal features. It is true that cases rarely arise which present the situation discussed in the *dictum* in the *Armstrong* case; but cases arise constantly which involve the actual *decision* in that case. In the typical collision case the actual net recovery is almost invariably less than the amount paid by the hull underwriters, and they receive this recovery in partial reimbursement of their loss. Under the decision below it would appear that this long-settled practice will be changed, and the assured will participate in the recovery as a co-insurer, in respect of the difference between the insured value and the actual value, even though he has recovered this difference from P. P. I. underwriters. To minimize the obvious injustice of this result, the court makes the novel suggestion that the rights of hull underwriters may depend on the amount of P. P. I. insurance which the assured chooses to take out,—*i. e.*, on transactions with which the hull underwriters have absolutely nothing to do. This problem will arise in practically every collision case where there is a recovery in respect of hull damage.

(8) This Court has pointed out the desirability of keeping the law of marine insurance uniform in England and the United States.

> *Queen Insurance Co.* v. *Globe & Rutgers Fire Insurance Co.*, 263 U. S. 487, 493.

The present is a particularly strong case for the application of this principle, since under the decision

below a different rule is applicable to identical policies covering the same vessel, where they are issued by different offices of the same company. We do not suggest that American law should be changed to conform to English law, but we do submit that where the law of the United States and England has been the same for more than a generation, our courts should not change that law in the United States excepting for reasons of the gravest importance. In this connection we refer to a case decided fifty years ago by the House of Lords, which is still one of the leading cases on the construction of marine insurance policies, and we quote as follows from the opinion of Lord Herschell in that case:

> "I think it will be found, upon examination of the authorities, that the general words in a marine policy have received from the courts, for a long series of years, a construction to which your Lordships would do well to adhere. The instrument is one in daily use, and if your Lordships were to put a new construction upon it you would be likely to defeat, and not to give effect to, the intention of the parties. *Nothing would be more dangerous, in my opinion, than to depart from a construction which the authorities have put upon words in common use in a mercantile instrument, even if the propriety of the decision might originally have been open to question.*" (Italics ours.)
>
> *Thames & Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.*, 12 A. C. 484, at page 494.

WHEREFORE, your petitioners respectfully pray that this Court issue writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit, directing it to send to this Court for review, a full and complete transcript of the record and all

proceedings of the cases entitled on its docket: No. L57-271 Aetna Insurance Company, Plaintiff-Appellant-Appellee, against United Fruit Company, Defendant-Appellee-Appellant; No. L57-272 Union Marine and General Insurance Company, Limited, formerly Union Marine Insurance Company, Ltd., Plaintiff-Appellant-Appellee, against the same; and No. L57-273 Boston Insurance Company, Plaintiff-Appellant-Appellee, against the same; and that the said decrees of the United States Circuit Court of Appeals for the Second Circuit be reversed by this Honorable Court; and that your petitioners may have such other and further relief in the premises as to this Court may seem meet and just; and your petitioners will ever pray.

Dated, New York, February 7, 1938.

AETNA INSURANCE COMPANY,
UNION MARINE AND GENERAL INSURANCE COMPANY, LTD.,
BOSTON INSURANCE COMPANY,
Petitioners,

By D. ROGER ENGLAR,
T. CATESBY JONES,
OSCAR R. HOUSTON,
MARTIN DETELS,
Attorneys for Petitioners.

Supreme Court of the United States

OCTOBER TERM, 1937.

No.————

AETNA INSURANCE COMPANY,

Petitioner,

—against—

UNITED FRUIT COMPANY,

Respondent.

UNION MARINE & GENERAL INSURANCE COMPANY, LTD., formerly Union Marine Insurance Company, Ltd.,

Petitioner,

—against—

UNITED FRUIT COMPANY,

Respondent.

BOSTON INSURANCE COMPANY,

Petitioner,

—against—

UNITED FRUIT COMPANY,

Respondent.

BRIEF FOR PETITIONERS.

Opinions Below.

The opinion of the United States District Court for the Southern District of New York appears at pages 100-108 of the record, and is reported in 18 F. Supp. at page 441. The opinion of the Circuit Court of Appeals for the Second Circuit appears at pages 163-169 of the record, and is reported in 92 F. (2d) at page 576.

Jurisdiction of This Court.

The jurisdiction of this Court is under Section 240 of the Judicial Code as amended by the Act of February 13, 1925, U. S. Code, Title 28, Section 347, and under Article 3, Section 2, Clause 1 of the Constitution of the United States. The decrees of the Circuit Court of Appeals were entered November 15, 1937.

The Facts.

The facts have been fully stated in the petition and will not be repeated here. We shall, however, as a part of our argument, refer to the record in support of some of the statements of fact made in the petition.

I.

The rule applied in the *Livingstone* is still law in the Sixth and Ninth Circuits and the decision below creates a conflict between the law of those circuits and the law of the Second Circuit.

In *Brown* v. *Merchants Marine Insurance Company*, 152 Fed. Rep. 411, the Steamship "City of Kingston" was insured under policies in which she was valued at $75,000. She was sunk in a collision, for which both vessels were held at fault. In the litigation which grew out of the collision, the "City of Kingston" was found to be worth $140,000. There was an actual net recovery of $47,426.97. A controversy arose between different sets of underwriters, which it is unnecessary to discuss here.* For the purposes of the present case

* In the *Brown* case, apparently the P. P. I. policies did not contain any waiver of salvage.

the important point is that the total amount of insurance on the "City of Kingston" was only about half of her actual value. Nevertheless no part of the recovery was claimed by or paid to the owners. The *Livingstone* was cited and followed. We submit that this case is still good law in the Ninth Circuit where it was decided.

In *Federal Insurance Company* v. *Detroit Fire & Marine Insurance Company,* 202 Fed. Rep. 648, the court had to determine the rights of hull underwriters in respect of funds recovered from another vessel with which the insured vessel was in collision. Owing to the fact that both vessels were at fault the amount recovered was less than the insured value. After citing the *Livingstone* and other authorities the Circuit Court of Appeals for the Sixth Circuit said at page 653:

> "The amount sued for was in excess of the total insurance paid; but, since the damages resulting from the collision were divided, the total recovery on account of the loss of the Etruria was materially less than her agreed valuation for insurance. So far as the libel is applicable to the amount recovered, the suit was wholly of a representative character, and the owner of the Etruria, the Transit Company, was, under well-settled principles, trustee for the beneficiaries of such recovery. *United States* v. *American Tobacco Co.,* 166 U. S. 468, 474, 17 Sup. Ct. 619, 41 L. Ed. 1081; *Fairgrieve* v. *Marine Ins. Co.,* 94 Fed. 686, 688, 37 C. C. A. 190 (C. C. A. 8th Cir.); *The St. Johns* (D. C.) 101 Fed. 469, 473, and decisions there cited; Arnould on Marine Ins. §1226, at page 1388."

We call particular attention to the citation of Judge Brown's decision in the *St. Johns,* and we submit that the rule of the *St. Johns* (later adopted in the *Livingstone*) is still good law in the Sixth Circuit.

II.

The decision below is contrary to a rule of law established by this court more than fifty years ago.

In *The Potomac,* 105 U. S. 630, at page 635, this Court referred to the valuation in a hull policy and said:

> "And that valuation is conclusive in respect of all rights and obligations arising upon the policy of insurance. *North of England Insurance Association* v. *Armstrong,* Law Rep. 5 Q. B. 244."

We have already quoted the language used by this Court in *Mobile and Montgomery R. Co.* v. *Jurey,* 111 U. S. 584, at pages 594-5, where the *Armstrong* case was cited and approved (*supra,* p. 14).

We submit that the approval of the *Armstrong* case in the *Potomac* case and the *Jurey* case was more than mere dictum. While these cases presented different facts, the principle of the *Armstrong* case was relevant and was relied upon in reaching the decisions. Certainly this was the view taken by Judge Addison Brown, when he said of the *Armstrong* case:

> "The decision in that case has been repeatedly cited by the supreme court with apparent approval and to some extent followed. *The Potomac,* 105 U. S. 630, 634, 26 L. Ed. 1194; *Railway Co.* v. *Jurey,* 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527" (101 Fed. Rep, at p. 476).

The court below does not even mention the *Jurey* case, and its only comment on *The Potomac* is as follows:

> "It is scarcely necessary more than to allude to the kind of approval supposed to have been

given to *North of England Association* v. *Armstrong, supra* (L. R. 5 Q. B. 244), in the *Potomac*, 105 U. S. 630, 635" (R., p. 168).

III.

The decision below clearly overrules the decision of the same court in the case of *The Livingstone*, 130 Fed. Rep. 746.

The facts in the case of *The Livingstone* were as follows:

The Steamship "Grand Traverse" was sunk and became a total loss as the result of a collision with the Steamship "Livingstone". In a suit brought by the owners of the "Grand Traverse" against the "Livingstone", the latter vessel was held solely at fault and the owners of the sunken vessel recovered her full value, which was fixed at $37,500. The "Grand Traverse" was insured for $25,000 under policies in which she was valued at that amount. The leading underwriters on the "Grand Traverse" also insured the liability of the "Livingstone", and the proceedings against the latter vessel were brought over their active opposition. When, however, the liability of the "Livingstone" was established, the underwriters on the "Grand Traverse", who had paid a total loss in the sum of $25,000, intervened and claimed the entire amount of the recovery, less the expenses of litigation. The matter came on to be heard in the United States District Court for the Western District of New York. *The Livingstone*, 122 Fed. Rep. 278. After a careful review of the authorities, Judge Hazel held that the valuation in the policies on the "Grand Traverse" was conclusive as between the parties, and that the underwriters were entitled to the entire net recovery, even

though it exceeded the amount which they had paid. In the course of his opinion (at p. 284) he said:

> "I do not regard myself at liberty to depart from an established principle which, to use the language of Judge Brown in *International Navigation Company* v. *Atlantic Mutual Insurance Co.* (D. C.) 100 Fed. 314, is 'so long established as may well be deemed to enter into the contract as the understanding of the parties to it'."

The case was appealed to the Circuit Court of Appeals for the Second Circuit, where Judge Hazel's decision was modified, and it was held that the underwriters were only entitled to repayment of the amounts which they had severally paid under their policies, together with interest thereon; and that whatever balance of the net recovery remained after underwriters had been thus reimbursed, belonged to the assured.

In stating its decision, the Circuit Court of Appeals said that the underwriters were to be

> "completely indemnified for the loss sustained by them in paying the insurance";

and affirmed their right to

> "full and complete reimbursement for all losses and expenditures made by them incident to the insurance".

If there could be any doubt as to the meaning of this language, it is set at rest by the concluding paragraph of the opinion, which reads as follows:

> "The decree is reversed with costs of this appeal and the case is remanded to the District Court with instructions to enter a decree awarding the appellees *interest on the sums paid by them during*

the time they were deprived of the use of said sums, and awarding the balance of the fund in court, *after paying court fees and charges,* to the libellants." (Italics ours.)

In other words, the Circuit Court of Appeals ordered that the expenses of the litigation, including attorneys' fees, be deducted from the fund; that the underwriters then receive the amount of their payments, with interest for the period during which they were deprived of the use of the money; and that the remainder be paid over to the assured.

The decision resulted in a full recovery by underwriters, with interest, while the owners received only a small recovery in respect of their uninsured interest in the vessel. This circumstance was called to the court's attention on a motion for a reargument and the point was emphasized by copious references to the pleadings, the assignments of error and the mandate of the Circuit Court of Appeals. The motion for a rehearing was denied. We shall not burden this Court with citations from the record in connection with this motion for a rehearing, since the opinion below admits that the decision in the *Livingstone* did actually produce the effects claimed by these petitioners. The only ground on which it is sought to distinguish that case is, apparently, that it was inadvertently decided. We submit that the language above quoted from the opinion definitely negatives that ground of distinction. We further submit that the lower court's attempt to distinguish the *Livingstone* decision is nullified by its obvious misunderstanding of the reasoning on which that decision was based.

In *The Livingstone* case, the Circuit Court of Appeals merely recognized the binding effect of the valuation clause in the policy. The effect of that clause

had been pointed out by Judge Addison Brown in the case of *International Navigation Co.* v. *Atlantic Mutual Insurance Co.,* 100 Fed. 304, at page 323. In applying the clause against the underwriters, he said:

> "In all the cases here considered, the thing insured is the whole vessel, not simply a distinct aliquot part of it. What is valued in these policies, is not a certain fraction of the vessel, as of a part owner, but the whole vessel, and the entire quantum of the interest of the libelant, which owned the whole of it. The insurers are, therefore, estopped from claiming that, as respects the ship, any other or larger interest than that which they valued and insured, was benefited by the salvage service."

The estoppel to which Judge Brown referred, applies equally against the owners of the vessel, and was so applied by Judge Brown in the case of *The St. Johns,* 101 Fed. 469. We quote from the opinion in that case, as follows, at pages 474-6:

> "But I know of no principle of law or equity, by which the owner upon a settlement under a valued policy can be heard to allege a larger valuation of the ship uncovered by insurance, for the purpose of letting him in as constructive insurer, so as thereby to share in another remedy for the same loss to the insurer's prejudice. If the owner makes any claim upon the insurer under the policy, he must abide by its terms. The valuation stated in the policy is a part of the basis of the contract. It is a very material condition affecting in various ways the rights and liabilities of both parties. * * * * * * * * * * * *
>
> The right of the owner to be treated as constructive insurer of any uninsured excess of value above that stated in the policy, was involved in the

recent case in this court of *International Nav. Co.* v. *Atlantic Mut. Ins. Co.* (D. C.), 100 Fed. 304, although the interests were there reversed.

* * * * * * *

Amid some conflicting decisions, it was there considered that the sounder opinion at the present day is, that as respects all matters affecting the measure of compensation or the rights of either party growing out of the insurance contract, the valuation fixed by the policy operates as an estoppel upon both parties alike. *There the estoppel was in favor of the assured, here it operates to the advantage of the insurer; but the same rule is applied to both.*" (Italics ours.)

We have already referred to Judge Brown's prophetic statement of the limitation on the rights of underwriters, which was later adopted by the Circuit Court of Appeals in the case of *The Livingstone* (*supra*, p. 11). The authority of the *St. Johns* case has never been questioned until the decision of the Circuit Court of Appeals in the present litigation. Its authority is now denied on the theory that it was overruled in the case of *The Livingstone;* whereas in fact it was the principal basis of the decision in that case.

IV.

Methods of conducting the business of hull insurance both in the United States and abroad have been adjusted carefully to the long line of decisions overruled by the decision of the lower court in this case.

After discussing the American and English decisions which are mentioned in the petition, the Circuit Court of Appeals said:

"All this does not in our opinion make up such a uniform body of authority that we must assume the doctrine as an implied term in American hull policies. Besides, although we are not

> advised of the circumstances in which the 'recovery statement' was made, we do know that it was prepared by persons especially versed in such questions, and they at any rate followed the orthodox rule."

We are unable to give the foregoing passage any interpretation excepting that the court accepted the action of the shipowner's brokers as conclusive evidence of the prevailing practice in similar cases. The court had previously said that, after the judgment was paid, the respondent—

> "engaged the well known marine insurance agents, Johnson & Higgins, who prepared a 'recovery statement' * * *."

It would seem from the foregoing passage that the Circuit Court of Appeals were under the impression that Messrs. Johnson & Higgins were first called into this matter in a quasi-judicial capacity. It is the fact (and it appears from the third sheet of Exhibit 7, opposite p. 92) that Johnson & Higgins were the brokers who placed the insurance for the respondent in the first instance. The fact that they gave the underwriters the barest minimum which could even plausibly be defended, and gave the lion's share of the recovery to their employers, is nothing to their discredit; but there is not the slightest basis in fact for treating their distribution as an impartial or judicial determination. It is stipulated that these petitioners have not admitted its correctness (R., pp. 62-3, fols. 186-7; p. 77, fol. 229; p. 86, fol. 256).

That Johnson & Higgins did not distribute the recovery according to any definite principle, clearly appears from their own statement on page 4 of Exhibit 9 (the lithographed recovery statement which is filed with the Record). For the convenience of the Court we attach hereto, as Appendix A, a copy of the last

paragraph on the page above mentioned, relating to certain negotiations between the owners and the English hull underwriters, in which Johnson & Higgins acted as intermediary. The last sentence is as follows:

> "All the points raised by the English Underwriters were thereby resolved to the mutual satisfaction of themselves and the Owners."

This clearly shows that the settlement with the English underwriters was arrived at by negotiation, and not by the application of the "orthodox rule" to which the lower court refers.

The American underwriters were not parties to the negotiations or the settlement mentioned above (R., pp. 62-3, fols. 186-7; p. 77, fol. 229; p. 79, fol. 237; p. 86, fol. 256; p. 88, fol. 264). We attach hereto, marked Appendix B, an analysis of the payments made to English and American underwriters respectively, from which it appears that the respondent and its brokers adopted a much less generous attitude toward the American companies than toward the British companies.

In the light of the foregoing facts it is clearly apparent that the distribution of the recovery in this case was not made according to any definite rule, but was the subject of negotiations designed to adjust the matter on a basis favorable to the respondent.

The District Court, which based its decision on the earlier authorities and on the record in this case, found that the rule of the *Armstrong* case has become "the accepted rule". We submit that this conclusion is unavoidable when the record is carefully examined.

At the outset we call attention to the following paragraph in respondents' answers:

> "In addition to the policies of insurance referred to in Paragraph 3 of the complaint, the

> defendant also, in accordance with the customary practice, procured other policies of insurance upon the S. S. 'Almirante' for increased valuation in the sum of £65,105, which additional insurance covered only against total and/or constructive total loss and was permitted by the terms of the hull policies" (R., p. 13, fol. 39; p. 25, fol. 75; p. 37, fol. 111).

The foregoing allegations establish two facts which are significant in this connection.

First, the practice followed in this case was customary.

Second, the £65,105 of additional insurance was placed "upon the S. S. 'Almirante' for increased valuation". We mention this to forestall any suggestion that this insurance was not actually on the value of the vessel, but upon some other interest.

We next turn to the two sets of policies themselves and find that the hull policies (Exhibits 6, 7, 8 at pp. 91, 93, 95) contain the following provision:

> "In ascertaining whether the Vessel is a constructive total loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account."

Under this provision it is clear that if the damage to the vessel equals or exceeds the insured value, the owner may abandon to his underwriters and claim a constructive total loss. Phillips on Insurance, 5th Edition, Vol. 2, Secs. 1519, 1532; Arnould on Marine Insurance and Average, 11th Edition, Vol. 2, Secs. 1132, 1134.

The P. P. I. insurance, which is stated to be on "Disbursements" etc., contains the same clause above quoted with respect to constructive total loss, and also the following very important provision:

> "To follow Hull Underwriters in the event of total or constructive or compromised total loss" (last sentence of paragraph 3 of the second sheet of Exhibits 1, 2 and 4 Annexed to Exhibit 1, R., pp. 65, 67, 71).

Considering the two sets of policies together, it is apparent that the assured is fully protected up to the aggregate of his insurance. All damage claims and other partial loss claims are payable in full under the hull policies up to the amount insured.* If such claims exceed the valuation in the hull policies, then the assured may abandon and collect as for a constructive total loss under the hull policies; and this collection automatically entitles him to collect a total loss under the P. P. I. policies, which are against total loss only but agree to "follow Hull Underwriters".

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* Up to the limit of the amount insured, each policy pays such proportion of the loss as the amount insured bears to the insured value; or (expressing the same result in another way) such proportion of the amount insured as the loss bears to the policy value. *International Nav. Co.* v. *Atlantic Mut. Ins. Co.*, 100 Fed. 304, at page 321. In the present case the respondent carried as coinsurer a line of $50,609; that is to say, the amount insured was this much less than the insured value. As to this sum, the respondent is clearly and admittedly entitled to be treated just like any other hull underwriter; and it was so treated by its brokers in the recovery statement (Exhibit 9, p. 44). The lower court apparently confused this recognized and admitted coinsurance (which applies to a part of the agreed value) with a wholly different form of coinsurance which has no existence under a hull policy, *i. e.*, coinsurance in respect of an actual value in excess of the agreed value.

To remove the possible doubt as to the effect of the valuation in cases of salvage and general average,—a doubt to which this Court referred in the case of *Gulf Refining Company* v. *Atlantic Mutual Insurance Company,* 279 U. S. 708, at pages 713-4, the hull insurance policies issued by these petitioners contain the following clause:

> "This insurance is fully to indemnify the assured for any and all charges and expenses applicable to the vessel in respect of the perils insured hereunder, irrespective of the value of the vessel, and this policy shall pay its share of such charges and expenses in the proportion which the amount hereby insured bears to the value as declared herein" (second sheet of Exhibits 6, 7, 8, R. 91, 93, 95).

Under this clause it is clear that the actual value of the vessel can never affect the settlement of a loss under the hull policies.

Another significant fact is that the P. P. I. policies specifically provide that "this insurance is without benefit of salvage" (second sheet of Exhibits 1, 2, 4 Annexed to Exhibit 1, R., pp. 65, 67, 71). The reason and the necessity for this provision are obvious. Under the rule in the *Armstrong* case the hull underwriters are preferred both in respect of any value realized from the wreck and in respect of recoveries from third parties. Accordingly, if the P. P. I. Underwriters were entitled to participate in salvage, this right would conflict with the established rights of hull underwriters.

A comparison of the two sets of policies discloses that the P. P. I. policies are written for a much lower premium than the hull policies. The P. P. I. Underwriters can afford to take a lower premium because

they insure against total loss only. For the same reason they can afford to waive salvage. The hull underwriters, on the other hand, pay all partial losses, which constitute by far the greater part of losses paid.* In consideration of their accepting this burden, the hull underwriters get a larger premium and have a preferred position in respect of the proceeds of the wreck and recoveries from third parties.

We submit that no one who carefully considers the method of insuring this vessel (which is admitted to be the customary method) can escape the conclusion that this method was carefully devised in the light of the long line of decisions beginning with the *Armstrong* case.

The Circuit Court of Appeals apparently dismisses the facts above pointed out as a mere series of coincidences, and assumes that "owing to the peculiar nature of the 'P. P. I.' policies" their proceeds may be treated by the owner as a mere "windfall". With all respect, we submit that the owner has a windfall not because of any peculiarity of P. P. I. policies but solely because the lower court declined to follow a long line of authorities in the light of which those policies were formulated. The Circuit Court of Appeals suggests that the obvious difficulties created by its rejection of a long established practice may be minimized by a new method of apportionment under which the rights of hull underwriters would depend on the question whether and to what extent the shipowner had taken out P. P. I. insurance, which, it is said, should "be brought into hotchpot" (R., p. 166). This suggestion is wholly novel and is not claimed to have any support either in law or usage. It is not

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* *The case of Pitman v. Universal Marine Co., mentioned by the Circuit Court of Appeals, is not an exception to this rule, but merely illustrates the point that the assured cannot recover more than his actual loss.*

clear just how this novel method of apportionment is to be applied, but it is significant that in the present case it did not prevent the respondent from realizing a large profit while its underwriters received substantially less than the amount of their payments.

In order that the fundamental question involved in this litigation may not be obscured by the unusual facts upon which it arises, we call attention to the fact that the basic policy form issued by the hull underwriters contained a warranty restricting the amount of "disbursements" insurance which could be taken out; but this restriction was expressly waived by a clause in the printed endorsement attached to the hull policies.* This waiver was obviously intended to permit the owners to protect themselves in the situation created by the great rise in hull values due to war conditions.

In considering the matter on principle, it must be borne in mind that the hull policies ordinarily limit the amount of P. P. I. insurance which can be placed, thereby forcing the assured to increase the amount of his hull insurance, which requires a corresponding increase in the agreed valuation in the hull policies. Thus, in the ordinary case, the aggregate of the hull policies (and the valuation in those policies) is only slightly less than the actual value of the vessel, leaving only a small sum to be covered by P. P. I. policies in which the right of subrogation is waived. It is for this reason that the net recovery from third parties, after the deduction of all expenses, rarely equals and still more rarely exceeds the amount paid by the hull underwriters.

---

* "It is agreed that the owners and/or managers are at liberty to insure Disbursements and/or other interests to any amount at their own absolute discretion: and the Underwriters hereby waive disclosure of the amounts so insured" (R. 91, 93, 95).

V.

The decision below is not based on any principle of justice or equity.

In the courts below the principal argument for the defendant was based on the general contention that there was some injustice or lack of equity in the position of the plaintiffs. In answer to this argument, we desire to point out that general principles of equity can have very little application to a purely arbitrary and artificial arrangement. Where, as here, such arrangements are deliberately entered into by persons skilled in a particular business, they are designed to produce and commonly do produce arbitrary and artificial results. Such results are purely conventional and, therefore, involve no question of justice or injustice.

As respondent itself points out in its answers (Paragraph 10th), it is the customary practice for shipowners to supplement their hull insurance by insurance against total loss only. As we have shown above, by this ingenious method of placing his insurance the shipowner obtains, at a greatly reduced price, the same complete protection which he would have in a case where all his insurance was on the full form including particular average. Obviously this system works to the advantage of the shipowner and to the disadvantage of the hull underwriter, from the standpoint of losses as well as premiums, owing to the well settled rule that the hull underwriters pay the vessel's repair bills in full notwithstanding the fact that the actual value of the vessel greatly exceeds the agreed value.

As an original proposition, hull underwriters might argue with a good deal of force that it was unjust for them to pay a repair bill of $75,000 on a vessel valued at $100,000, but actually worth $500,000. They could

point out, with perfect justice, that if the vessel had been worth only $100,000, the repair bill would have been very much less. Such an argument, however, would be without merit, because the liability of the underwriters flows from an arbitrary arrangement to which they are parties, and which they are presumed to understand when they enter into it. Under these circumstances, it is idle to talk about abstract principles of justice and equity. Indeed, in the present case, the recognized rule of adjustment is stated in the policies (Exhibits 6, 7 and 8) as follows:

> "This insurance is fully to indemnify the assured for any and all charges and expenses applicable to the vessel in respect of the perils insured hereunder, irrespective of the value of the vessel, and this policy shall pay its share of such charges and expenses in the proportion which the amount hereby insured bears to the value as declared herein."

The custom and usage above mentioned are equally binding on the shipowner. The usual practice, as the answers point out, is for the shipowner to protect himself by taking out policies against total loss only, without benefit of salvage, in respect of that part of the actual value in excess of the value agreed in the hull policies. In the present case, although the respondent followed this practice, it did not carry it far enough to keep pace with the enormously increased value of the ship owing to war conditions. This, however, does not affect the general practice or the principle involved.

Leaving out the extraordinary circumstances of the present case, the Court can readily ascertain from the record the usual practice in these matters. The underwriters who insure against total loss only are well aware that they are not to share in any recoveries, and this understanding is ordinarily expressed in the policy (as it was in this case) by inserting a provision that

it shall be "without benefit of salvage" (*supra,* p. 34). If there is any recovery, it goes to the hull underwriters; and the shipowner, if not fully compensated by the hull insurance, looks to the total loss insurance for compensation in respect of the excess value. No question of justice or equity arises; the whole matter is governed by settled custom. Everyone recognizes and concedes that the hull underwriters occupy a preferred position in the matter of recovery from third parties.

There is nothing new about the practice above mentioned. Thirty-eight years ago Judge Addison Brown referred to

> "the well-known practice of insuring against a total loss only a variety of different interests under the name of 'disbursements';—an interest so different, as to have no share in salvage on total constructive loss."

In dealing with this subject, Judge Brown went on to say:

> "The description of the subject insured, namely, 'disbursements,' it cannot be doubted, was deliberately chosen to signify a wholly different risk from that upon 'hull, machinery and equipment,' and in order to distinguish the two as wholly different classes of insurance."
>
> *International Navigation Co.* v. *Atlantic Mutual Insurance Co.,* 100 Fed. Rep. 304, at page 307.

As Judge Brown recognized, the entire system of insuring against total loss only was arranged with a view to avoiding any conflict between the two classes of insurance. This could only be done by selecting for the interest insured against total loss only, some designation which would clearly indicate that the

total loss only insurance was not to contribute with the hull insurance in the event of loss or share with it in the event of recovery. The fiction is that the total loss only insurance is not on the hull at all; but the actual fact is, of course, as stated in the defendant's answers in these cases, *i. e.* that insurance against total loss only is taken out on P. P. I. conditions to cover the actual value of the vessel in excess of the insured value fixed in the hull policies. Great ingenuity has been used to keep the two sets of insurance separate and guard against any claim that the total loss only insurers are entitled to share in any salvage or recovery.

The present case can be better understood by considering what would happen in a case which was not complicated by the very sudden rise in values which occurred here due to war conditions. Suppose that a shipowner has a vessel worth half a million dollars; he insures $400,000 under full hull covers in which the vessel is valued at that sum; and $100,000 under policies which are against total loss only and without benefit of salvage. His vessel is sunk in collision with another vessel, the latter being solely at fault. The assured collects half a million dollars under his policies and then collects half a million dollars from the *tort feasor,* incurring legal and other expenses of $100,000. He now has in hand $900,000 as against an actual loss of $500,000. The total loss only underwriters are admittedly not entitled to share in the recovery. On the respondent's theory, the assured would only be called upon to return to the hull underwriters $320,000—*i. e.,* the amount of their payment less their share (4/5ths) of the legal expenses. Accordingly, the assured would make a clear profit out of the loss of his vessel in the sum of $80,000 over and above the half million dollars which the vessel was worth. As the contract of insurance is a contract

of indemnity the assured certainly would not be entitled to any such profit.

The only distinction between the case above put and the present case is that in the present case the amount of P. P. I. insurance taken out by the respondent was not sufficient to cover the difference between the insured value and the actual value. We submit, however, that the effect of the valuation clause in the policies issued by these petitioners cannot be dependent upon the amounts insured under other independent contracts, with which these petitioners have nothing to do. The hull policies gave the respondent permission to take out as much P. P. I. insurance as it saw fit, and the question whether it took out much or little can have no bearing on the interpretation of the hull policies. Moreover, even in the present case, the respondent pocketed a very substantial "windfall" over and above the full amount of its loss (*supra*, p. 6).

CONCLUSION.

Because the decision below determines an important question of marine insurance law contrary to the rule as stated by this Court and heretofore uniformly recognized and applied in this and other Circuits as well as in England, and changes a rule of law which has been relied upon for many years by shipowners and underwriters throughout the world, we submit that a writ of certiorari should be issued in order that the question may be reviewed and definitely settled by this Court.

Respectfully submitted,

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Attorneys for Petitioners.

APPENDIX A.

(Extract from p. 4 of Exhibit 9)

Some of the English Underwriters on hull inquired as to the basis of the apportionment of the expenses and costs, and some of the P. P. I. underwriters inquired, in view of the large amount recovered, whether the owners would be willing to compensate the P. P. I. underwriters by making them some equitable refund. In respect to the first inquiry the lawyers' opinion was requested, and it has been agreed that on the basis of the Underwriters' receiving the sum insured by them and the owners the excess of the recovery over and above that amount, that all expenses and costs incurred should be divided one-fifth to hull underwriters and four-fifths to the owners. The second inquiry was placed before the owners, who gave it favorable consideration and decided to refund all the P. P. I. underwriters 50% of the face of their policies less the same percentage of expenses and costs as is paid by the owners. All the points raised by the English Underwriters were thereby resolved to the mutual satisfaction of themselves and the Owners.

NOTE: *The plaintiffs were not parties to the agreement mentioned above* (R., pp. 62-3, fols. 186-7; p. 77, fol. 229; p. 79, fol. 237; p. 86, fol. 256; p. 88, fol. 264).

APPENDIX B.

A comparison of the sums insured by the English underwriters on vessel (English hull underwriters) with the sums insured by the English P. P. I. underwriters (Exhibit 13, R., p. 99) shows that English hull underwriters who insured £54,851 of the total English hull insurance of £61,305 (R., p. 97), also insured £43,690 (R., p. 99) of the total P. P. I. insurance amounting to £65,105 (R., p. 97, fol. 290). In other words, approximately 90% in amount of the English hull insurance, in addition to receiving as hull underwriters the same proportion of the recovery as was received by the American underwriters, also received about ⅔rds of the gift to the P. P. I. underwriters (R., p. 99, fol. 296).

The English hull underwriters as a whole, insuring a total of £61,305, received as hull underwriters a recovery of £61,248.7.6 less charges of £6,984.6.9 (Exhibit 9, p. 50), or a net recovery of £54,264.0.9; and as P. P. I. underwriters, they received a net recovery of £17,396.3.2 (43,690/65,105ths of £25,923.0.6, R., fol. 296, Exhibit 9, pp. 51, 52), making a total net recovery of £71,660.3.11: which is almost 117% of the total sum of £61,305 insured by all the English hull underwriters.

However, the English underwriters who insured £54,851, or about 90% of the hull insurance placed in the English market (R., p. 99, fol. 296), received net as hull underwriters £48,551.5.8 (54,851/61,305ths of £54,264.0.9), and as P. P. I. underwriters £17,396.3.2 (*supra*), making a total net recovery of £65,947.8.10, which is about 120% of the £54,851 paid by them as hull underwriters (R., p. 99, fol. 297).

A comparison of this 120% recovery received by 90% of the English hull underwriters, with the approximately 89% recovery received by the American hull underwriters, throws considerable light on the attitude of the English hull underwriters, about which the defendant cross-examined Mr. Grant at the trial (R., pp. 52-55).

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CHARLES ELMORE CROPLEY
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Supreme Court of the United States

OCTOBER TERM, 1937.

Nos. 773-774-775.

AETNA INSURANCE COMPANY,

Petitioner,

—against—

UNITED FRUIT COMPANY,

Respondent.

UNION MARINE & GENERAL INSURANCE COMPANY, LTD., formerly Union Marine Insurance Company, Ltd.,

Petitioner,

—against—

UNITED FRUIT COMPANY,

Respondent.

BOSTON INSURANCE COMPANY,

Petitioner,

—against—

UNITED FRUIT COMPANY,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

D. ROGER ENGLAR,
T. CATESBY JONES,
OSCAR R. HOUSTON,
MARTIN DETELS,
Attorneys for Petitioners.

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PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

We file this reply brief for the purpose of calling the Court's attention to several statements in the brief filed by the respondent, which are either contrary to the record or wholly unsupported by the record.

I.

On page 4 of its brief, respondent takes the position that the greater part of the English P. P. I. insurance covered interests other than the value of the "Almirante". The footnote on page 6 is to the same effect. These statements are directly contrary to respondent's answers, which state that all of this insurance was "upon the SS. 'Almirante' for increased valuation" (see p. 3 of the Petition).

II.

On page 8 of its brief, the respondent makes the following extraordinary statements:

> "All of the cases referred to by the petitioners are *partial loss cases.* The law of those cases is not affected by this decision, which is carefully confined to cases of *total loss* where the recovery is in excess of the agreed valuation."

Both of these statements are clearly and demonstrably erroneous. The cases on which petitioners primarily rely are *North of England Insurance Association* v. *Armstrong* (1870), L. R. 5 Q. B. 244, and *The Livingstone,* 130 Fed. Rep. 746. Both of these were cases of total loss.

The statement that the decision below is carefully confined to cases "where the recovery is in excess of the agreed valuation", is equally erroneous, as clearly appears from a reading of the opinion of the Circuit Court of Appeals. Perhaps the most conclusive evidence on this point is that court's disapproval of *The St. Johns* (101 Fed. Rep. 469), and the *Arm-*

strong case, *supra,* in both of which the recovery was much less than the agreed valuation in the policies. The plain fact is that the opinion below will apply to all cases where the actual value of the vessel is greater than the value fixed in the policies. This means that the decision will apply in practically every case; for the respondent's own answers show that it followed the customary practice in the present case, where it undervalued the vessel in the hull policies and supplemented them with P. P. I. insurance against total loss only (see p. 32 of Brief attached to Petition).

III.

The argument that the policies under which the "Almirante" was insured are now "obsolete" is wholly without support in the record and is not correct. So far as concerns the only point raised in the petition (namely, the effect of the valuation clause), hull policies are just the same today as they were in 1870 when the Queens Bench decided the *Armstrong* case, *supra,* and in 1884, when this Court decided the case of *Mobile and Montgomery R. Co.* v. *Jurey,* 111 U. S. 584.

Dated, March 2, 1938.

Respectfully submitted,

D. Roger Englar,
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Oscar R. Houston,
Martin Detels,
Attorneys for Petitioners.

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BRIEF ON BEHALF OF PETITIONERS.

D. ROGER ENGLAR,
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MARTIN DETELS.

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Supreme Court of the United States

OCTOBER TERM, 1937.

Nos. 773, 774 and 775.

AETNA INSURANCE COMPANY,

Petitioner,

—against—

UNITED FRUIT COMPANY,

Respondent.

UNION MARINE & GENERAL INSURANCE COMPANY, LTD., formerly Union Marine Insurance Company, Ltd.,

Petitioner,

—against—

UNITED FRUIT COMPANY,

Respondent.

BOSTON INSURANCE COMPANY,

Petitioner,

—against—

UNITED FRUIT COMPANY,

Respondent.

BRIEF ON BEHALF OF PETITIONERS.

Opinions Below.

The opinion of the United States District Court for the Southern District of New York appears at pages 77-82 of the record, and is reported in 18 F. Supp. at page 441. The opinion of the Circuit Court of Appeals for the Second Circuit appears at pages 107-113 of the record, and is reported in 92 F. (2d) at page 576.

Jurisdiction of This Court.

On March 14, 1938, orders were filed herein allowing certiorari on the petitions of Aetna Insurance Company, Union Marine & General Insurance Company, Ltd. and Boston Insurance Company for writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit (R., pp. 117-8). The jurisdiction of this Court is under Section 240 of the Judicial Code as amended by the Act of February 13, 1925, U. S. Code, Title 28, Section 347, and under Article 3, Section 2, Clause 1 of the Constitution of the United States.

Statement of Matter Involved.

The petitioners are underwriters who insured the steamship "Almirante", and who paid the full amount insured under their policies when the vessel was sunk on September 6, 1918, in collision with the steamship "Hisko", owned and operated by the United States Government. The respondent was the owner of the "Almirante". These actions were brought by the petitioners in the United States District Court for the Southern District of New York, on the law side, to recover certain monies which the owner of the "Almirante" had recovered from the United States Government, as owner of the "Hisko", and which the petitioners claim on the principle of subrogation.

The material facts are all admitted in the pleadings or stipulated by the parties, so that the cases involve a pure question of law.

For the purpose of this brief, the three cases will be treated as one. These cases are representative of a large number of similar claims, and the

reason for bringing three suits was to present three typical situations depending on the form of receipt, if any, taken by the various insurance companies interested. In certain cases the respondent relied on the form of receipt taken. As neither of the lower courts considered the receipts material, we shall not discuss them in this brief.

The respondent originally purchased the "Almirante" in 1914 for $400,000. In May, 1918, she was insured with various underwriters in the United States and England, including these petitioners, under policies of hull insurance in which she was valued at the sum of $632,610.

In addition to this hull insurance the owner obtained in London various "P. P. I."* or "honor" policies aggregating £65,105, against total loss only of the "Almirante". The interest insured in these policies is variously described as "increased value", "disbursements", etc., but the respondent's answers specifically state (in paragraph 10) that these policies were "upon the SS. 'Almirante' for increased valuation" (R., pp. 9, 16, 23). These policies were stated to be without benefit of salvage; admittedly they were not legally enforceable, and payments under such policies gave rise to no rights of subrogation. English Marine Insurance Act of 1906, Sec. 4; *Edwards & Co.* v. *Motor Union Insurance Co.*, 1922, 2 K. B. 249 (R., pp. 29, 30; Exhibit 10, p. 73; see opinion of Circuit Court of Appeals, R. 108).

The respondent not only concedes but alleges that the foregoing insurances were placed "in accordance with the customary practice" (R., pp. 9, 16, 23).

After the "Almirante" was sunk as a result of the collision with the "Hisko", the respondent in

* These letters stand for "policy proof of interest".

December 1918 collected a total loss from underwriters who insured the "Almirante" in the following sums:

American Hull Underwriters		$284,673.00
English Underwriters:		
Hull	£61,305.	
P. P. I.	65,105.	
	£126,410.	
(at exchange of $4.75-¾; R., p. 61)		601,395.57
Total		$886,068.57

After a considerable lapse of time an Act of Congress was passed, permitting suit to be brought against the United States, as owner of the "Hisko". In that suit, which was not concluded until 1932, the respondent recovered for the loss of the "Almirante", including stores and sundries, $1,763,013.38* (Recovery Statement Exhibit 9, p. 42). The expenses of the litigation amounted to upwards of $300,000, but after deducting these expenses and adding a small item of bank interest there remained a net recovery of $1,463,997.09.

Accordingly, after collecting the judgment in the collision suit the respondent had in hand the following sums in respect of the loss of the "Almirante":

Collected from American Hull Underwriters		$284,673.00
From English Hull Underwriters	£61,305	

* The hull policies covered the "tackle, apparel" and "stores", of the "Almirante", as well as the hull and machinery (Exhibits 6, 7 and 8). The only item about which there can be any dispute is an item of "sundries" amounting to $1,320.36, which is too small to have any significance in this connection.

From English P. P. I. Underwriters	65,105	
	£126,410	601,395.57
Carried by respondent as self-insurer		50,609.00*
Net recovery in collision suit		1,463,997.09
Total		$2,400,674.66

All of the foregoing figures appear in the recovery statement issued by Johnson & Higgins, the respondent's brokers, under date of November 22, 1932, Exhibit 9, any part of which it was stipulated could be offered in evidence by either party as *prima facie* evidence of any of the facts stated therein (R., pp. 42, 54, 60). The figures are summarized in Exhibit 12, which is a recapitulation offered at the trial (R., pp. 33, 74).

Out of these funds the shipowner partially reimbursed its underwriters, as follows (Exhibit 12, R., pp. 74-5):

Paid to American Hull Underwriters	$ 252,681.36
Allocated to respondent as self-insurer	44,921.54
Paid to English Hull Underwriters	184,197.35
Paid to English P. P. I. Underwriters	85,999.64
Retained by respondent	1,832,874.77
Total	$2,400,674.66

* As to this item (being the difference between the amount insured and the agreed value), the respondent was correctly treated just like any other hull underwriter (Recovery Statement, Exhibit 9, p. 44). See in this connection note on page 37, *infra*.

It will be noted that a substantial sum was paid to the P. P. I. underwriters, who admittedly had no legal right to any part of the fund. Owing to the fact that most of the P. P. I. insurance was written by the same English underwriters who insured the hull (R., p. 76, Exhibit 13), and the remainder was largely written by companies which were affiliated with English hull underwriters by stock ownership (R., pp. 37-8), this gratuitous payment to P. P. I. underwriters was, in effect, a payment to the English hull underwriters and, as a result, English hull underwriters obtained a much more favorable settlement than American hull underwriters. Indeed, in some cases this disparity applied to different policies written by the same company. Some of the English companies wrote dollar policies at their American branches in New York, and sterling policies at their home offices in London (R., pp. 35-6). In these cases the English home office received a more favorable settlement than the American branch.*

The final result was that the American hull underwriters have received back about 89% of what they had paid out fourteen years before. Although the net recovery from the "Hisko" was considerably more than twice the valuation fixed in the hull policies, the American hull underwriters did not even receive the full amount of their payments, to say nothing of interest for the fourteen years that had intervened. The sum retained by the respondent ($1,832,874.77, *supra*, p. 5) was nearly three times the valuation in the hull policies and about $70,000 in excess of the value of the vessel as fixed by the courts, even after

* See Appendix A *infra*, page 49, for a more detailed analysis of the payments made to American and English underwriters respectively, showing clearly the very favorable treatment which the respondent and its brokers accorded to the English underwriters as compared with the American underwriters.

the respondent had paid to the English P. P. I. underwriters a large sum (nearly $86,000) which was not legally due.

The Issue Presented.

The sole issue presented in the present litigation is the effect of a valuation clause in a marine insurance policy on a vessel. In *Gulf Refining Co.* v. *Atlantic Mutual Insurance Co.*, 279 U. S. 708, this Court had occasion to consider the effect of an agreed valuation in a marine policy. In that case, however, the policy was on cargo, and this Court pointed out the different effect which is given to a valuation clause in the cases of hull and cargo policies respectively. As explained in that opinion, the assured under a valued cargo policy is, in effect, a co-insurer in respect of any excess over the agreed valuation. A shipowner, however, recovers his loss in full under a hull policy, without regard to the relation between the actual value and the agreed value; so that the element of co-insurance is wholly lacking under such policies. For that reason it has always been held, until the decision in the present case, that the valuation in a hull policy is conclusive for all purposes as between the parties. In the *Gulf Refining Co.* case this Court indicated that there might be some question about this rule as applied to general average cases; but any such doubt is removed in the present case by the express terms of the policies (see *infra*, p. 38). Under these policies it is clear that the actual value of the vessel does not enter into the computation of the loss in any way whatsoever, even in cases of salvage or general average.

Accordingly, these cases present squarely the question whether a valuation which is binding on the underwriters for all purposes is binding on the assured

in the matter of apportioning recoveries from third parties. In *Mobile & Montgomery R. Co.* v. *Jurey,* 111 U. S. 584, at pages 594-5, this Court answered this question in the affirmative; and that rule has been uniformly applied in this country ever since.

It is the contention of the petitioners that, under the rule laid down by this Court in the *Jurey* case, they were entitled to full and complete reimbursement, including interest on their respective payments while they were deprived of the use of their funds. The petitioners maintain that their right of reimbursement is a first charge on the recovery; and only after their claim has been satisfied can the owner participate in the fund recovered from a third party tort feasor.

Decision of the District Court.

The District Court held that

> "it has become the accepted rule that where the hull insurer has first paid the value agreed on in the policy and the owner later recovers a sum from a third person whose negligence caused or contributed to the loss, the insurer may recoup the net sum so recovered, up to the full amount of the payment under the policy" (R., p. 80).

The District Court specifically held that the present cases fell squarely within the decision of the Circuit Court of Appeals for the Second Circuit in the case of *The Livingstone,* 130 Fed. 746.

Following the rule as above stated, the District Court gave the plaintiffs judgment for the difference between the amounts they had respectively paid out in 1918 and the amounts they had received back in 1932, but without interest.

Cross appeals were taken. The petitioners appealed because they had not received interest on the amounts

of their respective payments in accordance with the decision in the *Livingstone* case. The respondent appealed on the ground that the petitioners were entitled to no recovery whatever.

Decision of the Circuit Court of Appeals.

The Circuit Court of Appeals reversed the decision of the District Court and dismissed the complaints, holding that the plaintiffs were not entitled to any recovery whatever. The following are some of the more important features of the opinion of the Circuit Court of Appeals:

It concedes that its decision in the present cases is contrary not only to English law but to its own decision in *The Livingstone* (*supra*), more than thirty years ago, and to the earlier decision of Judge Addison Brown in *The St. Johns* (101 Fed. 469).

It suggests that the court did not intend to decide as it did in *The Livingstone,* but that its decision may have been the result of inadvertence.

It does not mention the language used by this Court in the *Jurey* case (quoted, *infra,* pp. 12, 13), although that language was quoted in full in the petitioners' brief in the Circuit Court of Appeals.

It declines to recognize the difference between hull and cargo policies pointed out by this Court in the *Gulf Refining Company* case (*supra,* p. 7).

It permits an assured to make a profit out of his loss by refusing to underwriters the full reimbursement to which they are entitled under their right of subrogation.

It concedes that it should not lightly overrule a long-established usage, but finds that there is no such usage on the question involved here. This finding is contrary to the finding of the District Court (R., p. 80) and contrary to the record, and is apparently

based on the fact that the shipowner's brokers distributed the money as they did (R., p. 112).

A remarkable feature of the opinion below is its frank expression of inability to understand why Judge Brown's decision in *The St. Johns* (101 Fed. 469) was cited in the *Livingstone* opinion, in view of the fact that

> "its reasoning was necessarily overruled, and although unquestionably it has the great authority of the judge who decided it, we cannot regard it as unimpaired" (R., p. 112).

In *The Livingstone,* the court did not merely cite *The St. Johns,* but referred specifically to certain pages of the opinion in that case. An examination of those pages discloses that, far from overruling Judge Brown's reasoning, *The Livingstone* adopted his reasoning in its entirety. The lower court's misunderstanding of *The Livingstone* and *The St. Johns* is readily demonstrable from its opinion, and appears to have been a controlling factor in its decision.

Argument.

I.

It is settled by a long line of decisions, from which the decision in this case is the first and only dissent, that the valuation in a hull policy is controlling in the distribution of recoveries from third parties, and that the underwriters are entitled to full reimbursement on the basis of the agreed value before the assured can share in any such recovery.

In 1870 the Court of Queens Bench decided the case of *North of England Insurance Association* v. *Armstrong,* L. R. 5 Q. B. 244. In that case

a vessel was insured for £6,000 and valued at that sum, although actually worth £9,000. She was sunk in a collision and the underwriters paid a total loss. Thereafter the owners recovered £5,000 from the owners of the colliding vessel, who were able to limit their liability to that sum. It was held that the underwriters were entitled to the entire recovery. The rule applied in that case has ever since been accepted as settled law in England, and has been part of the statutory law of England since 1906.

Thames & Mersey Marine Insurance Co., Ltd. v. *The British & Chilian Steamship Co.* (1915), 2 K. B. 214;
Goole & Hull Steam Towing Co. v. *Ocean Marine Ins. Co.* (1928), 1 K. B. 589, 593;
(English) Marine Insurance Act of 1906, Section 79 (1).*

As this Court has pointed out, the English Marine Insurance Act is a codification of the common law. *Standard Marine Insurance Company* v. *Scottish Metropolitan Assurance Company, Ltd.*, 283 U. S. 284, at page 289.

By way of dictum the court which decided the *Armstrong* case said that the underwriters would have been entitled to the entire recovery even if it had exceeded the amount of their payment. This dictum has been criticized by some of the English courts, but the question has never actually arisen in England.

In 1881 this Court decided the case of *The Potomac*, 105 U. S. 630, in which it cited with approval the

* 6 Edw. 7, c. 41. A copy of this Act appears as an appendix to all of the recent editions of Arnould on Marine Insurance and Average, and we cite that appendix to the Court for convenience of reference.

Armstrong case for the proposition that the valuation in the policy "is conclusive in respect of all rights and obligations arising upon the policy of insurance". In that case the underwriters on the steamship "Robert E. Lee" paid a claim for damage caused by collision with the steamship "Potomac", and later gave to the owners of the latter vessel a release of their claim for damages. This Court held that the underwriters were the owners of that proportion of the claim which the amount insured bore to the agreed valuation. It is true that this method of adjustment was provided for in the policy; but the opinion clearly indicates that this Court would have applied the same rule in the absence of any stipulation on the subject.

In 1884 this Court decided the case of *Mobile & Montgomery R. Co.* v. *Jurey*, 111 U. S. 584, where cotton insured for part of its value was entirely destroyed by fire while in transit. The action against the railway was brought in the name of the shippers for the benefit of the insurer, and the railway company argued that the recovery must be limited to the amount paid by the insurance company. This Court, however, held that the carrier was bound to respond for all the damages sustained by the breach of his contract, pointing out in this connection (at p. 594) that the payment of a total loss by the insurer worked an equitable assignment to him of the property and *all the remedies* which the insured had against the carrier for the recovery of its value. In support of its conclusion this Court cited various authorities, and referred to the *Armstrong* case as follows:

> "Insurers of a ship which has been run down and sunk by the fault of another ship, are, upon their payment of a total loss, subrogated to the

> right of the insured to recover therefor against the owners of the latter vessel, and if their policy was a valued one, their payment of this value will give them the whole *spes recuperandi,* and the right to the whole damages, though the insured vessel was, in fact, worth a larger sum than the valuation named in the policy. *North of England Ins. Association* v. *Armstrong,* L. R. 5 Q. B. 244. See also, *Clark* v. *Wilson,* 103 Mass. 219, 227."

In 1900, Judge Addison Brown had occasion to consider the effect of the valuation clause in a hull policy, in the case of *International Navigation Co.* v. *Atlantic Mutual Ins. Co.,* 100 Fed. 304. It was there contended by hull underwriters that a claim for salvage should be apportioned over the actual value of the hull, and that the assured should bear the share of the salvage allocated to the excess of actual over agreed value. Judge Brown rejected this contention, saying:

> "In all the cases here considered, the thing insured is the whole vessel, not simply a distinct aliquot part of it. What is valued in these policies, is not a certain fraction of the vessel, as of a part owner, but the whole vessel, and the entire *quantum* of the interest of the libelant, which owned the whole of it. The insurers are, therefore, estopped from claiming that, as respects the ship, any other or larger interest than that which they valued and insured, was benefited by the salvage service."

The estoppel to which Judge Brown referred in the *International Navigation Co.* case applies equally against the owners of the vessel; and later in the same year it was so applied by Judge Brown in the case of *The St. Johns,* 101 Fed. 469. We quote from the opinion in that case, as follows, at page 473:

> "Upon losses by collision wholly through the

fault of another vessel, the insurers ought by the very nature of their contract of indemnity to find a complete recoupment in their remedy over against the wrongdoer; and except where the assured undervalues his vessel in the policy, he suffers no loss thereby. He cannot complain in such a case that the insurers through recoupment have suffered no loss. If then, for his own supposed advantage, the owner insures the ship at a large undervaluation, by what equity can he claim that the rule ordinarily applied and known to belong to the contract of insurance, should be modified in his favor to save him from a part of the loss caused by the undervaluation alone?"

At page 474:

"But I know of no principle of law or equity, by which the owner upon a settlement under a valued policy can be heard to allege a larger valuation of the ship uncovered by insurance, for the purpose of letting him in as constructive insurer, so as thereby to share in another remedy for the same loss to the insurer's prejudice. If the owner makes any claim upon the insurer under the policy, he must abide by its terms. The valuation stated in the policy is a part of the basis of the contract. It is a very material condition affecting in various ways the rights and liabilities of both parties. * * *"

And at page 475:

"The right of the owner to be treated as constructive insurer of any uninsured excess of value above that stated in the policy, was involved in the recent case in this court of *International Nav. Co.* v. *Atlantic Mut. Ins. Co.* (D. C.), 100 Fed. 304, although the interests were there re-

> versed. * * * Amid some conflicting decisions, it was there considered that the sounder opinion at the present day is, that as respects all matters affecting the measure of compensation or the rights of either party growing out of the insurance contract, the valuation fixed by the policy operates as an estoppel upon both parties alike. *There the estoppel was in favor of the assured, here it operates to the advantage of the insurer; but the same rule is applied to both.*" (Italics ours.)

The case of *The St. Johns* presented precisely the same question which had been decided in the *Armstrong* case. Judge Brown decided that the valuation in the policy was conclusive and that the underwriters were entitled to the entire recovery, which was less than the amount they had paid under their policies. He cited the *Armstrong* case, and said:

> "The decision in that case has been repeatedly cited by the supreme court with apparent approval and to some extent followed. *The Potomac,* 105 U. S. 630, 634, 26 L. Ed. 1194; *Railway Co.* v. *Jurey,* 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527" (101 Fed. at p. 476).

We submit that Judge Brown was correct in his opinion (clearly indicated in the above quotation) that this Court's approval of the *Armstrong* case, in *The Potomac* and in the *Jurey* case, was more than mere dictum. In both of these cases the principle established in the *Armstrong* case was relied upon as one of the links in the chain of reasoning which led to the decision.

With characteristic foresight and caution, however, Judge Brown made it clear that he was adopting

only the decision and not the dictum in the *Armstrong* case.. He said (101 Fed. at pp. 474-5):

> "If the amount recoverable from the wrong-doer, after payment of the damage-claims of third parties, were in excess of the amount paid by underwriters to the assured, no doubt that excess would belong to the latter; since the insurers' right of subrogation in equity could not extend beyond recoupment or indemnity for the actual payments to the assured."

In 1904 the Circuit Court of Appeals for the Second Circuit decided the case of *The Livingstone* (130 Fed. 746; certiorari denied 194 U. S. 637) which presented the precise state of facts mentioned in the dictum in the *Armstrong* case, *i. e.*, the recovery was greater than the amount which the underwriters had paid under their policy. The District Court had followed the dictum in the *Armstrong* case and given the underwriters the entire recovery. The Circuit Court of Appeals reversed this decision and held that the underwriters were entitled to full and complete reimbursement before the assured could receive any share of the recovery; but that when the underwriters had been fully reimbursed (*i. e.*, had received the amount of their respective payments with interest), the excess belonged to the assured. In reaching this result the Circuit Court of Appeals followed exactly the reasoning of Judge Addison Brown in *The St. Johns,* notwithstanding its statement in the present case that the reasoning of *The St. Johns* "was necessarily overruled" in *The Livingstone.* In the latter case (at p. 749) the citation of *The St. Johns* refers specifically to pages 474 and 475; and the passage last above quoted from *The St. Johns* begins on page 474 and ends on page 475. This is convincing evidence that the Circuit Court of Ap-

peals followed instead of overruling Judge Brown's reasoning. Even more positive evidence appears, however, from the respective opinions:

Judge Brown said that the rights of the underwriters are limited, because

> "the insurers' right of subrogation in equity could not extend beyond recoupment or indemnity for the actual payments to the assured" (101 Fed. at p. 475).

The Circuit Court of Appeals said:

> "The doctrine of subrogation has its origin in equity, its purpose is indemnity and its object is attained when the insurer has been fully compensated" (130 Fed. at p. 749).

It is plain, therefore, that the lower court erred in its statement that the *Livingstone* decision had overruled the reasoning of Judge Brown in *The St. Johns*. The court was equally mistaken in its statement that

> "the mid ground which the plaintiffs suggest—that the underwriters should be merely preferred to the owner—has no warrant in law. Unless his right of subrogation gives him recovery *in toto*, he must let in the owner as co-insurer, as in other similar situations" (R., p. 111).

The position of the plaintiffs did have "warrant in law" to the extent of a very carefully considered opinion by Judge Addison Brown, and a decision to precisely the same effect by the Circuit Court of Appeals for the Second Circuit, both of which have stood unchallenged for more than thirty years. The rule very clearly laid down in those cases was that a hull underwriter who has paid a total loss under

a valued policy is entitled to full reimbursement out of any recovery from third party tort feasors; but that as the doctrine of subrogation is an equitable doctrine, it cannot be pursued to the point of giving the underwriter a profit out of the transaction.

In *Brown* v. *Merchants Marine Insurance Company*, 152 Fed. 411 (C. C. A. 9th Circuit), the Steamship "City of Kingston" was insured under policies in which she was valued at $75,000. She was sunk in a collision, for which both vessels were held at fault. In the litigation which grew out of the collision, the "City of Kingston" was found to be worth $140,000. There was an actual net recovery of $47,426.97. A controversy arose between different sets of underwriters, which it is unnecessary to discuss here.* For the purposes of the present case the important point is that the total amount of insurance on the "City of Kingston" was only about half of her actual value. Nevertheless no part of the recovery was claimed by or paid to the owners. *The Livingstone* was cited and followed.

In *Federal Insurance Company* v. *Detroit Fire & Marine Insurance Company*, 202 Fed. 648, the court had to determine the rights of hull underwriters in respect of funds recovered from another vessel with which the insured vessel was in collision. Owing to the fact that both vessels were at fault the amount recovered was less than the insured value. After citing *The Livingstone* and other authorities the Circuit Court of Appeals for the Sixth Circuit said at page 653:

> "The amount sued for was in excess of the total insurance paid; but, since the damages resulting

* In the *Brown* case, apparently the P. P. I. policies did not contain any waiver of salvage.

from the collision were divided, the total recovery on account of the loss of the Etruria was materially less than her agreed valuation for insurance. So far as the libel is applicable to the amount recovered, the suit was wholly of a representative character, and the owner of the Etruria, the Transit Company, was, under well-settled principles, trustee for the beneficiaries of such recovery. *United States* v. *American Tobacco Co.*, 166 U. S. 468, 474, 17 Sup. Ct. 619, 41 L. Ed. 1081; *Fairgrieve* v. *Marine Ins. Co.*, 94 Fed. 686, 688, 37 C. C. A. 190 (C. C. A. 8th Cir.); *The St. Johns* (D. C.) 101 Fed. 469, 473, and decisions there cited; Arnould on Marine Ins. §1226, at page 1388."

We call particular attention to the citation of Judge Brown's decision in *The St. Johns,* which was the basis of the decision in *The Livingstone.*

The leading text writers support the rule of the decisions above cited.

"If the valuation is neither intended as a cover for a wager, by both parties, nor fraudulently made, it is binding on the parties, in case it can be carried into effect, and will, as between them, determine the value of the property." (Phillips on Insurance, Fifth Edition, Vol. 2, Sec. 1183, pages 3 and 4.)

It may be noted that the Fifth and last edition of Phillips was published in 1867, some years before the decision in the *Armstrong* case.

"The rule that the valuation is conclusive between the parties applies equally in favor of the underwriter." (Arnould on Marine Insurance and Average, Eleventh Edition, Vol. I, Sec. 339, page 476.)

In the present case the Circuit Court of Appeals made the following suggestion as to the interpretation of the valuation clause:

> "* * * on the other hand it might be understood as meaning only that the underwriters should not be called upon to pay more than the agreed amount, and that they should not be free to assert that the vessel was worth less when sued upon their policies" (R., p. 109).

Under this interpretation the valuation clause could never be invoked by the underwriters excepting as a maximum limit of their liability,—a purpose for which it has no possible value, because the liability of each underwriter is limited by the amount which he insures, and which is never more and is usually very much less than the agreed value. We have found no authority whatever for such an interpretation of the valuation clause; and no such authority is cited by the Circuit Court of Appeals, or was cited by the respondent in the lower courts. We believe the authorities are unanimous to the effect that an agreed valuation is equally binding on both parties to the contract of insurance.*

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* Although cases arising under cargo policies have no direct bearing on the case at bar, because of the well-settled practice of adjusting cargo losses on a co-insurance basis (*Gulf Refining Co.* v. *Insurance Co.*, 279 U. S. 708, at p. 710), such cases do support the general rule that an agreed valuation is binding equally on both parties to the contract and cannot be treated as a mere maximum limit of the underwriter's liability. Thus, where goods are undervalued, the valuation clause reduces the amount which the assured can recover, notwithstanding the total claim may be less than the agreed value. This result follows necessarily from the rule of adjustment applied under cargo policies. This rule, which was formulated in 1761 in the case of *Lewis* v. *Rucker*, 3 Burr. 1167, was recognized and approved by this Court in the *Gulf Refining Co.* case, *supra*. The effect of the valuation clause in a cargo policy is, of course, wholly different from its effect in a hull policy; but in both classes of cases the valuation binds both parties equally.

II.

The measure of reimbursement to which Underwriters are entitled includes interest on their respective payments.

Under the principle applied in the *Armstrong* case and *The St. Johns,* and approved by this Court in *The Potomac* and the *Jurey* case, the underwriters are clearly entitled to the entire net recovery from third parties, so long as it does not exceed the amount of their actual payments. No question can arise as to the precise measure of their reimbursement until the net recovery exceeds the insured value; and this has never happened excepting in the present case and the case of *The Livingstone,* 130 Fed. 746. These facts lend peculiar importance to the decision in *The Livingstone.*

The facts in the case of *The Livingstone* were as follows:

The Steamship "Grand Traverse" was sunk and became a total loss as the result of a collision with the Steamship "Livingstone". In a suit brought by the owners of the "Grand Traverse" against the "Livingstone", the latter vessel was held solely at fault and the owners of the sunken vessel recovered her full value, which was fixed at $37,500. The "Grand Traverse" was insured for $25,000 under policies in which she was valued at that amount. The leading underwriters on the "Grand Traverse" also insured the liability of the "Livingstone", and the proceedings against the latter vessel were brought over their active opposition. When, however, the liability of the "Livingstone" was established, the underwriters on the "Grand Traverse", who had paid a total loss in the sum of $25,000, intervened and claimed the entire amount of the recovery, less the expenses of

litigation. The matter came on to be heard in the United States District Court for the Western District of New York. *The Livingstone,* 122 Fed. 278. After a careful review of the authorities, Judge Hazel held that the valuation in the policies on the "Grand Traverse" was conclusive as between the parties, and that the underwriters were entitled to the entire net recovery, even though it exceeded the amount which they had paid. In the course of his opinion (at p. 284) he said:

> "I do not regard myself at liberty to depart from an established principle which, to use the language of Judge Brown in *International Navigation Company* v. *Atlantic Mutual Insurance Co.* (D. C.), 100 Fed. 314, is 'so long established as may well be deemed to enter into the contract as the understanding of the parties to it'."

Evidently Judge Hazel's attention was not called to Judge Brown's language in *The St. Johns,* in which he made it clear that he was adopting only the decision and not the dictum in the *Armstrong* case (*supra,* p. 16).

The *Livingstone* case was appealed to the Circuit Court of Appeals for the Second Circuit, where Judge Hazel's decision was modified, and it was held that the underwriters were only entitled to repayment of the amounts which they had severally paid under their policies, together with interest thereon; and that whatever balance of the net recovery remained after underwriters had been thus reimbursed, belonged to the assured.

In stating its decision, the Circuit Court of Appeals said that the underwriters were to be

> "completely indemnified for the loss sustained by them in paying the insurance";

and affirmed their right to

> "full and complete reimbursement for all losses and expenditures made by them incident to the insurance."

If there could be any doubt as to the meaning of this language, it is set at rest by the concluding paragraph of the opinion, which reads as follows:

> "The decree is reversed with costs of this appeal and the case is remanded to the District Court with instructions to enter a decree awarding the appellees *interest on the sums paid by them during the time they were deprived of the use of said sums,* and awarding the balance of the fund in court, *after paying court fees and charges,* to the libellants." (Italics ours.)

In other words, the Circuit Court of Appeals ordered that the expenses of the litigation, including attorneys' fees, be deducted from the fund; that the underwriters then receive the amount of their payments, with interest for the period during which they were deprived of the use of the money; and that the remainder be paid over to the assured.

The decision resulted in a full recovery by underwriters, with interest, while the owners received only a partial recovery in respect of their uninsured interest in the vessel. This circumstance was called to the court's attention on a motion for a reargument and the point was emphasized by copious references to the pleadings, the assignments of error and the mandate of the Circuit Court of Appeals. The motion for a rehearing was denied. We shall not burden this Court with citations from the record in connection with this motion for a rehearing, since the opinion below concedes that the decision in *The Livingstone* did actually produce the effects claimed by these petitioners. The only ground on which it is sought to distinguish

that case is, apparently, that it was inadvertently decided. We submit that the language above quoted from the opinion definitely negatives that ground of distinction. We further submit that the lower court's attempt to distinguish the *Livingstone* decision is nullified by its obvious misunderstanding of the reasoning on which that decision was based.

In the *Livingstone* case, the Circuit Court of Appeals merely recognized the binding effect of the valuation clause in the policy. The effect of that clause had been pointed out by Judge Addison Brown in the case of *International Navigation Co.* v. *Atlantic Mutual Insurance Co., supra,* and in *The St. Johns; supra*.

We have already referred to Judge Brown's prophetic statement in *The St. Johns* of the limitation on the rights of underwriters, which was later adopted by the Circuit Court of Appeals in the case of *The Livingstone* (*supra,* p. 16). The authority of the *St. Johns* case has never been questioned until the decision of the Circuit Court of Appeals in the present litigation. Its authority is now denied on the theory that it was overruled in the case of *The Livingstone;* whereas in fact it was the principal basis of the decision in that case.

The Circuit Court of Appeals suggests, in the present case, that there is no logical distinction between the decision and the dictum in the *Armstrong* case; if we adopt one, we must adopt both. No such difficulty exists. The principle announced in *The St. Johns* and applied in *The Livingstone* was based on the equitable principle that

> "The doctrine of subrogation has its origin in equity, its purpose is indemnity and its object

is attained when the insurer has been fully compensated" (*supra*, p. 17).

This is substantially the same principle by which courts of equity originally relieved a mortgagor from the strict terms of his mortgage. As a matter of strict law the mortgagee became the absolute owner of the property immediately on default; but the equity courts held that the mortgagor was entitled to redeem his property upon payment of the loan, together with all interest and all expenses necessarily incurred by the mortgagee.*

The cases above mentioned have been widely accepted and relied upon as establishing the respective rights of owners and underwriters under a valued policy of hull insurance. Justification for such reliance is found in the history of the cases, as well as in the text of the opinions.

The case of *International Navigation Co.* v. *Atlantic Mutual Ins. Co.* was affirmed by the Circuit Court of Appeals for the Second Circuit on the opinion below, 108 Fed. 987. Certiorari was denied by this Court, 181 U. S. 623. (See also, *International Navigation Co.* v. *Sea Ins. Co.*, 124 Fed. 93; affirmed, 129 Fed. 13.)

In the case of *The St. Johns,* no appeal was taken from the decision of Judge Addison Brown, which is at least some indication that it was accepted as a correct statement of the law.

In the case of *The Livingstone,* an application was made to this Court for a writ of certiorari, which was denied, 194 U. S. 637.

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* *Louisville Bank* v. *Radford*, 295 U. S. 555, at pp. 578-9. See also Resulting Trusts and Statute of Frauds by Honorable Harlan F. Stone, 6 Columbia Law Review 326 at pp. 338, 339; Kent's Commentaries (14th Edition) Vol. 4, pp. 142-3; Tiffany Real Property (2nd Edition) Vol. 3, Secs. 599 *et seq.* at pp. 2380, 2385 (Note 11), 2650-1, 2682-3.

In its brief in opposition to the petition for certiorari herein, the respondent suggested that the case of *International Navigation Co.* v. *Atlantic Mutual Insurance Company* was a case of doubtful authority, the correctness of which had been questioned by this Court. We submit that there is no foundation whatever for this suggestion. On the contrary, this case has always been regarded as one of the greatest American authorities on the interpretation of marine insurance policies. Not only has this case been followed in the actual conduct of the marine insurance business, but it has been repeatedly cited by this Court and the lower federal courts, as appears by reference to Shepard's Federal Citations. *The St. Johns* also has been repeatedly cited.* It is scarcely necessary in this Court to comment on the unique position which Judge Addison Brown occupied in connection with the development of the law of marine insurance in this country.

In the present case the Circuit Court of Appeals did not deal with the question of interest because it did not allow the underwriters to recover even the full principal amount of their payments. In the case of *The Livingstone,* however, the court allowed to underwriters the full amount of their payments with interest during the period while they were deprived of the use of their funds. We submit that the general principle laid down in the *Armstrong* case and approved by this Court in the *Jurey* case necessarily requires the allowance of interest, as was correctly decided in the *Livingstone* case. That general principle is that the underwriters are entitled to the full amount of the recovery subject only to the equitable limitation laid down in the *St. Johns* case and in *The*

* Shepard's Federal Citations show that *International Navigation Company* v. *Atlantic Mutual Insurance Co.* has been cited twenty-nine times, and *The St. Johns* has been cited thirteen times.

Livingstone, that the underwriters cannot receive more than full and complete reimbursement. Clearly the allowance of interest is not a violation of the foregoing limitation; on the contrary, interest is a necessary element without which the underwriters would not have received full restitution.

We submit that in the present case the District Court misinterpreted the *Livingstone* decision in the matter of interest. The District Court held that no interest could be allowed to petitioners in this case because no interest had been recovered from the owners of the colliding vessel. A careful reading of the *Livingstone* case, however, will disclose that it contains no reference to the recovery of interest as a part of the collision damages, and was not based in any way upon the fact of such recovery. The Circuit Court of Appeals in *The Livingstone* allowed interest to the underwriters on the plain ground that they were entitled to full and complete reimbursement, and that unless they received interest, they would not have received complete reimbursement.

That interest is a necessary and proper element of compensation to a person who has been deprived of money or property, was early decided and has been repeatedly recognized by this Court. In *Young* v. *Godbe,* 15 Wall. 562, page 565, this Court said:

> "It is said there is no law in the Territory of Utah prescribing a rate of interest in transactions like the one in controversy in this suit, and that, therefore, no interest can be recovered. But this result does not follow. If there is no statute on the subject, interest will be allowed by way of damages for unreasonably withholding payment of an overdue account. The rate must be reasonable, and conform to the custom

which obtains in the community in dealings of this character."

In *Billings* v. *United States,* 232 U. S. 261, this Court pointed out the difference between the federal rule and the rule in many of the states, saying (at p. 287):

> "The conflict between the systems is pronounced and fundamental. In the one, the state rule, except as to contract, no interest without statute; in the United States rule, interest in all cases where equitably due unless forbidden by statute."

In *Miller* v. *Robertson,* 266 U. S. 243, 257, 45 S. Ct. 73, 78, this Court said:

> "*Compensation is a fundamental principle of damages, whether the action is in contract or in tort. Wicker* v. *Hoppock,* 6 Wall. 94, 99, 18 L. Ed. 752. One who fails to perform his contract is justly bound to make good all damages that accrue naturally from the breach; and the other party is entitled to be put in as good a position pecuniarily as he would have been by performance of the contract. *Curtis* v. *Innerarity,* 6 How. 146, 154, 12 L. Ed. 380. One who has had the use of money owing to another justly may be required to pay interest from the time the payment should have been made. *Both in law and in equity, interest is allowed on money due. Spalding* v. *Mason,* 161 U. S. 375, 396, 16 S. Ct. 592, 40 L. Ed. 738." (Italics ours.)

This Court has repeatedly held that where property is taken for public use, "just compensation" requires the payment of interest.

> "The addition of interest allowed by the District Court is necessary in order that the owner

shall not suffer loss and shall have 'just compensation' to which he is entitled."

Seaboard Air Line Ry. v. *U. S.*, 261 U. S. 299, at page 306.

"The Government urges that the Conformity Act of August 1, 1888, does not require the United States Government to be bound by the rule of the state statute in the allowance of interest. This may be true, but we agree with the courts below that the allowance of just compensation by giving interest from the time of taking until payment is a convenient and fair method of ascertaining the sum to which the owner of the land is entitled. The fact that the rule is in harmony with the policy of the State where the lands are situated does not militate against but makes for the justice and propriety of its adoption. *United States* v. *Sargent, supra.*"

United States v. *Rogers*, 255 U. S. 163, at pages 169-170.

See also *Jacobs et al.* v. *United States*, 290 U. S. 13.

A statute which provides for the repayment of taxes illegally collected and paid under protest, does not afford adequate protection unless it provides for payment of interest. *Rogers et al.* v. *Daniel Oil & Royalty Co.*, 105 S. W. Reporter 476.

III.

The fact that no interest was recovered from the colliding vessel does not affect the right of the petitioners to full reimbursement including interest.

The argument for the respondent, which the District Court adopted, is that petitioners cannot receive interest because nothing was recovered from the owners of the "Hisko" in respect of interest. This

is, in substance, the same argument which was rejected in the *Armstrong* case, in *The St. Johns* and in *The Livingstone*. In all these cases, the recovery was based on a much larger value than the insured value; and it was argued that the insurance company could not claim anything which was recovered in respect of a value for which the assured was not compensated by the insurance. In all these cases, however, it was held that the insurance company was entitled to the full recovery, subject only to the limitation laid down in the American cases, that the underwriter could not receive more than full and complete indemnity in respect of his loss. The same situation is presented here. The sole question is what amount can the insurance companies equitably retain—*i. e.*, what amount will give them full and complete indemnity in respect of the loss they paid. This amount, when it has been fixed, the underwriters are entitled to receive; and it is no objection that part of the funds used to reimburse the underwriters may have been recovered in respect of a value for which they have not paid. This is precisely the point decided in the cases above mentioned.

In the *Armstrong* case, for example, the damages recovered were admittedly paid in respect of the entire actual value of the insured vessel, of which the owner had received only two-thirds from his underwriters. Nevertheless, the underwriters were permitted to retain the full recovery.

The case of *The St. Johns* is even more closely in point. In that case the Steamship "Catskill" was insured for $20,000 and valued at that sum. The commissioner appointed by the court found that she was a total loss, and that her actual value was upwards of $48,000. Both vessels were held at fault, so that the "Catskill" was only entitled to recover

half of her damages, and was liable for half the damages sustained by third parties on account of death, personal injury and loss of baggage or cargo. The figures are somewhat complicated, and we shall not deal with them in detail. The result was, however, that the amount actually received by the underwriters of the "Catskill" was substantially greater than they would have received if the actual value of the vessel as fixed by the Commissioner had not exceeded her insured value as fixed in the policy. In other words, a part of the money received by the underwriters was, in fact, recovered on account of the excess actual value of the vessel over and above the insured value.

The principle of the above cases applies equally in the present case. The amount recovered from the tort-feasor was double the amount required to reimburse the "Almirante" hull underwriters, even with full interest on the amount of their respective payments. As a matter of strict legal principle, the underwriters are entitled to the full recovery, because they have paid the full amount agreed upon between them and the owner as the value of the vessel. If, however, this Court adopts the equitable limitation imposed upon the rights of underwriters by *The St. Johns* and *The Livingstone,* this limitation can only be applied at the point where any further payment to underwriters would involve some unjust enrichment. Clearly, that point is not reached until the underwriters have received interest on their respective payments. The rule which bars the underwriters from receiving and retaining the entire recovery is not based on any right of the assured, it is based solely on the equitable nature of the right of subrogation, which was held, in the cases above mentioned, to prevent the underwriters from

reaping a profit from a loss of this character. So long as the underwriters have not made a profit, the rule does not apply; and it is abundantly clear from the decisions of this Court that the receipt of interest by a person who has been deprived of the use of his funds is not regarded as in the nature of a profit.

The respondent also argued below that it should not pay interest because it had not been guilty of any default or breach of obligation. This argument is beside the point. The fault on account of which the petitioners recover is the fault of the "Hisko". The respondent is not being asked to pay interest or to make any payment whatever out of its own funds. The question before the Court has to do with the distribution of a fund supplied by the United States Government as owner of the "Hisko". Under the decision in *The Livingstone*, the petitioners are entitled to full and complete reimbursement in respect of their payments, including interest. This does not mean that the respondent is being forced to pay interest, but merely means that the surplus received by the respondent out of the recovery fund is diminished to that extent. If the petitioners receive full interest on their payments, the respondent will still retain more than twice the agreed value of the vessel as stated in the insurance policies.

To sum up our argument under this head, the claim of the petitioners arises out of the fault of the "Hisko", and whatever amount they receive will be recovered for damages due to that fault. Such a recovery ordinarily carries interest. *The Manitoba*, 122 U. S. 97; *Boston Sand Co.* v. *United States*, 278 U. S. 41, at page 49; *The Baltimore Maru*, 11 F. (2nd) 836, at page 838; *Managua Nav. Co. et al.* v.

Aktieselskabet Borgestad, 7 F. (2d) 990 at page 993; *Straker* v. *Hartland,* 2 H. & M. 570, 34 L. J. Ch. 122. In the present case the tort-feasor was not liable for interest because it was a corporation sovereign,—the United States Government. This limit on the recovery, however, is no different from the limitation of liability to which the tort-feasor was entitled in the *Armstrong* case; or from the reduction in the recovery arising from mutual fault in the *St. Johns* case. Such limitations on the recovery have no bearing whatever on the measure of reimbursement to which underwriters are entitled under the general principle of the *Armstrong* case, or under the limitation thereon established in *The St. Johns* and *The Livingstone.* Under the principle laid down in those cases the petitioners are certainly entitled to "just compensation" as defined by this Court.

IV.

Methods of conducting the business of hull insurance both in the United States and abroad have been adjusted carefully to the long line of decisions overruled by the decision of the lower Court in this case.

For many years shipowners and their underwriters have believed the law to be well settled in accordance with the decision in the *Armstrong* case, and the statement of this Court in the *Jurey* case. When later the great authority of Judge Addison Brown was supplemented by the decision of the Circuit Court of Appeals for the Second Circuit in *The Livingstone,* and certiorari was denied by this Court (194 U. S. 637), it was thought that the question was no longer open. We submit that a rule which has been so long in force and so generally accepted, should be changed,

if at all, only by legislative action which would not disturb rights acquired in connection with past transactions.

In the present case, after discussing the American and English decisions which are mentioned above, the Circuit Court of Appeals said:

> "All this does not in our opinion make up such a uniform body of authority that we must assume the doctrine as an implied term in American hull policies. Besides, although we are not advised of the circumstances in which the 'recovery statement' was made, we do know that it was prepared by persons especially versed in such questions, and they at any rate followed the orthodox rule" (R., p. 112).

We are unable to give the foregoing passage any interpretation excepting that the court accepted the action of the shipowner's brokers as conclusive evidence of the prevailing practice in similar cases. The court had previously said that, after the judgment was paid, the respondent—

> "engaged the well known marine insurance agents, Johnson & Higgins, who prepared a 'recovery statement' * * *" (R., p. 108).

It would seem from the foregoing passage that the Circuit Court of Appeals were under the impression that Messrs. Johnson & Higgins were first called into this matter in a quasi-judicial capacity. It is the fact (and it appears from the third sheet of Exhibits 7 and 8, R., pp. 68 and 71) that Johnson & Higgins were the brokers who placed the insurance for the respondent in the first instance. The fact that they gave the underwriters the barest minimum which could even plausibly be defended, and gave the lion's

share of the recovery to their employers, is nothing to their discredit; but there is not the slightest basis in fact for treating their distribution as an impartial or judicial determination. It is stipulated that these petitioners have not admitted its correctness (R., pp. 42, 54, 60).

That Johnson & Higgins did not distribute the recovery according to any definite principle, clearly appears from their own statement on page 4 of Exhibit 9 (the lithographed recovery statement which is filed with the Record). For the convenience of the Court we attach hereto, as Appendix B, a copy of the last paragraph on the page above mentioned, relating to certain negotiations between the owners and the English hull underwriters, in which Johnson & Higgins acted as intermediary. The last sentence is as follows:

> "All the points raised by the English Underwriters were thereby resolved to the mutual satisfaction of themselves and the Owners."

This clearly shows that the settlement with the English underwriters was arrived at by negotiation, and not by the application of the "orthodox rule" to which the lower court refers.

The American underwriters were not parties to the negotiations or the settlement mentioned above (R., pp. 42, 54, 56, 60, 61).

In the light of the foregoing facts it is clearly apparent that the distribution of the recovery in this case was not made according to any definite rule, but was the subject of negotiations designed to adjust the matter on a basis favorable to the respondent.

The District Court, which based its decision on the earlier authorities and on the record in this case, found that the rule of the *Armstrong* case has become

"the accepted rule". We submit that this conclusion is unavoidable when the record is carefully examined.

We call particular attention to the following paragraph in respondent's answers:

> "In addition to the policies of insurance referred to in Paragraph 3 of the complaint, the defendant also, in accordance with the customary practice, procured other policies of insurance upon the S. S. 'Almirante' for increased valuation in the sum of £65,105, which additional insurance covered only against total and/or constructive total loss and was permitted by the terms of the hull policies" (R., pp. 9, 16, 23).

The foregoing allegations establish two facts which are significant:

First, the practice followed in this case was customary.

Second, the £65,105 of additional insurance was placed "upon the S. S. 'Almirante' for increased valuation". We mention this fact to forestall the suggestion (already foreshadowed in the respondent's brief in opposition to the petition for certiorari) that this insurance was not actually on the value of the vessel, but upon some other interest.

We next turn to the two sets of policies themselves and find that the hull policies (Exhibits 6, 7, 8 at pp. 63-72) contain the following provision:

> "In ascertaining whether the Vessel is a constructive total loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account."

Under this provision it is clear that if the damage to the vessel equals or exceeds the insured value, the owner may abandon to his underwriters and claim a constructive total loss. Phillips on Insurance, 5th Edition, Vol. 2, Secs. 1519, 1532; Arnould on Marine Insurance and Average, 11th Edition, Vol. 2, Secs. 1132, 1134.

The P. P. I. insurance, which is stated to be on "Disbursements" etc., contains the same clause above quoted with respect to constructive total loss, and also the following very important provision:

> "To follow Hull Underwriters in the event of total or constructive or compromised total loss" (last sentence of paragraph 3 of the second sheet of Exhibits 1, 2 and 4 Annexed to Exhibit 1, R., pp. 44, 46, 50).

Considering the two sets of policies together, it is apparent that the assured is fully protected up to the aggregate of his insurance. All damage claims and other partial loss claims are payable in full under the hull policies up to the amount insured.* If such claims exceed the valuation in the hull policies, then the assured may abandon and collect as for a constructive total loss under the hull policies; and this

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* Up to the limit of the amount insured, each policy pays such proportion of the loss as the amount insured bears to the insured value; or (expressing the same result in another way) such proportion of the amount insured as the loss bears to the policy value. *International Nav. Co.* v. *Atlantic Mut. Ins. Co.*, 100 Fed. 304, at page 321. In the present case the respondent carried as coinsurer a line of $50,609; that is to say, the amount insured was that much less than the insured value. As to this sum, the respondent is clearly and admittedly entitled to be treated just like any other hull underwriter; and it was so treated by its brokers in the recovery statement (Exhibit 9, p. 44). The lower court apparently confused this recognized and admitted coinsurance (which applies to a part of the agreed value) with a wholly different form of coinsurance which has no existence under a hull policy,—*i. e.*, coinsurance in respect of an actual value in excess of the agreed value.

collection automatically entitles him to collect a total loss under the P. P. I. policies, which are against total loss only but agree to "follow Hull Underwriters".

To remove any possible doubt as to the effect of the valuation in cases of salvage and general average,—a doubt to which this Court referred in the case of *Gulf Refining Company* v. *Atlantic Mutual Insurance Company,* 279 U. S. 708, at pages 713-4, the hull insurance policies issued by these petitioners contain the following clause:

> "This insurance is fully to indemnify the assured for any and all charges and expenses applicable to the vessel in respect of the perils insured hereunder, irrespective of the value of the vessel, and this policy shall pay its share of such charges and expenses in the proportion which the amount hereby insured bears to the value as declared herein" (second sheet of Exhibits 6, 7, 8, R. 64, 67, 70, sixth paragraph from the bottom).

Under this clause it is clear that the actual value of the vessel can never affect the settlement of a loss under the hull policies.

Another significant fact is that the P. P. I. policies specifically provide that "this insurance is without benefit of salvage" (second sheet of Exhibits 1, 2, 4 annexed to Exhibit 1, R., pp. 44, 46, 50—clause 12). The reason and the necessity for this provision are obvious. Under the rule in the *Armstrong* case the hull underwriters are preferred both in respect of any value realized from the wreck and in respect of recoveries from third parties. Accordingly, if the P. P. I. underwriters were entitled to participate in salvage, this right would conflict with the established rights of hull underwriters.

A comparison of the two sets of policies discloses that the P. P. I. policies are written for a much lower premium than the hull policies. The P. P. I. underwriters can afford to take a lower premium because they insure against total loss only. For the same reason they can afford to waive salvage. The hull underwriters, on the other hand, pay all partial losses, which constitute by far the greater part of losses paid.* In consideration of their accepting this burden, the hull underwriters get a larger premium and have a preferred position in respect of the proceeds of the wreck and recoveries from third parties.

We submit that no one who carefully considers the method of insuring this vessel (which is admitted to be the customary method) can escape the conclusion that this method was carefully devised in the light of the long line of decisions beginning with the *Armstrong* case.

The Circuit Court of Appeals apparently dismisses the facts above pointed out as a mere series of coincidences, and assumes that "owing to the peculiar nature of the 'P. P. I.' policies" their proceeds may be treated by the owner as a mere "windfall". With all respect, we submit that the owner has a windfall not because of any peculiarity of P. P. I. policies but solely because the lower court declined to follow a long line of authorities in the light of which those policies were formulated. The Circuit Court of Appeals suggests that the obvious difficulties created by its rejection of a long established practice may be minimized by a new method of apportionment under which the rights of hull underwriters would depend on the question whether and to what extent the shipowner had taken out P. P. I. insurance, which, it is

* The case of *Pitman* v. *Universal Marine Ins. Co.*, L. R. 9 Q. B. D. 192, mentioned by the Circuit Court of Appeals, is not an exception to this rule, but merely illustrates the point that the assured cannot recover more than his actual loss.

said, should "be brought into hotchpot" (R., p. 110). This suggestion is wholly novel and is not claimed to have any support either in law or usage. It is not clear just how this novel method of apportionment is to be applied, but it is significant that in the present case it did not prevent the respondent from retaining substantially more than the actual value of its vessel, while its underwriters received substantially less than the amount of their payments.

In considering the matter on principle, it must be borne in mind that the hull policies ordinarily limit the amount of P. P. I. insurance which can be placed, thereby forcing the assured to increase the amount of his hull insurance, which requires a corresponding increase in the agreed valuation in the hull policies. In the present case the warranty to this effect in the basic form was expressly waived by a clause in the endorsement,* presumably to permit the owners to protect themselves in the situation created by the great rise in hull values due to war conditions. In the ordinary case, however, the aggregate of the hull policies (and the valuation in those policies) is only slightly less than the actual value of the vessel, leaving only a small sum to be covered by P. P. I. policies in which the right of subrogation is waived. It is for this reason that the net recovery from third parties, after the deduction of all expenses, rarely equals and still more rarely exceeds the amount paid by the hull underwriters.

In closing under this head, we call attention to the fact that no evidence was offered to show that the rule in the *Armstrong* case has not been followed in prac-

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* "It is agreed that the owners and/or managers are at liberty to insure Disbursements and/or other interests to any amount at their own absolute discretion: and the underwriters hereby waive disclosure of the amounts so insured" (R. 64, 67, 70, fifth paragraph from the bottom).

tice. We submit that the cases above cited and discussed are at least *prima facie* controlling; there is a presumption that these cases have been followed in actual practice. More than thirty-five years ago, Judge Addison Brown referred to the rule applied in the *Armstrong* case as

> "the rule ordinarily applied and known to belong to the contract of insurance."
>
> *The St. Johns,* 101 Fed. 469, at page 474.

Indeed, the general principle applied in the *Armstrong* case was well established in this country long before that decision. In 1854, in the case of *Griswold, et al.* v. *Union Mut. Ins. Co.,* 3 Blatchf. 231, Federal Case No. 5840, Judge Betts said:

> "The general rule of commercial law is, that, as between insurers and insured, a valued policy is to be taken as setting the true value of the subject insured, unless the valuation is shown to be fraudulently or enormously excessive. This doctrine is laid down by text writers of the highest authority, and is sanctioned by adjudged cases in the United States and in England." (Citing numerous authorities.)

The *Griswold* case was decided in the Circuit Court for the Southern District of New York, by Circuit Justice Nelson and District Judge Betts. It involved a claim under a marine policy for a partial loss of freight.

Possibly it might be permissible to show that a different rule had been established by universal custom in recent years; but surely a long line of decisions cannot be brushed aside merely because a court assumes (in the absence of any evidence on the subject) that they have not been followed in actual practice and have not been a factor in the making of contracts.

V

The decision below is not based on any principle of justice or equity nor does the record disclose any reason for disturbing the well settled rules which have long governed the interpretation of marine insurance policies, both in the United States and abroad.

In the courts below the principal argument for the respondent was based on the general contention that there was some injustice or lack of equity in the position of the petitioners. In answer to this argument, we desire to point out that general principles of equity can have very little application to a purely arbitrary and artificial arrangement. Where, as here, such arrangements are deliberately entered into by persons skilled in a particular business, they are designed to produce and commonly do produce arbitrary and artificial results. Such results are purely conventional and, therefore, involve no question of justice or injustice.

It is a matter of common knowledge that the respondent in this case is one of the oldest and largest steamship companies under the American flag. Its insurance was placed by insurance brokers to whose prominence the Circuit Court of Appeals pays the highest possible tribute. Under these circumstances, there can be no doubt that the respondent purchased its insurance with the same care and discrimination which it used in buying its ships, its fuel and its other supplies. Its brokers knew perfectly well the effect of the valuation clause and the advantages to their employer, the assured, of fixing a low value.

As respondent itself points out in its answers (Paragraph 10th), it is the customary practice for shipowners to supplement their hull insurance by

insurance against total loss only. As we have shown above, by this ingenious method of placing his insurance the shipowner obtains, at a greatly reduced price, the same complete protection which he would have in a case where all his insurance was on the full form including particular average. Obviously this system works to the advantage of the shipowner and to the disadvantage of the hull underwriter, from the standpoint of losses as well as premiums, owing to the well settled rule that the hull underwriters pay the vessel's repair bills in full notwithstanding the fact that the actual value of the vessel greatly exceeds the agreed value.

As an original proposition, hull underwriters might argue with a good deal of force that it was unjust for them to pay a repair bill of $75,000 on a vessel valued at $100,000, but actually worth $500,000. They could point out, with perfect justice, that if the vessel had been worth only $100,000, the repair bill would have been very much less. Such an argument, however, would be without merit, because the liability of the underwriters flows from an arbitrary arrangement to which they are parties, and which they are presumed to understand when they enter into it. Under these circumstances, it is idle to talk about abstract principles of justice and equity. Indeed, in the present case, the recognized rule of adjustment is stated in the policies (see provision quoted p. 38, *supra*).

The customary rules of adjustment are equally binding on the shipowner. The usual practice, as the answers point out, is for the shipowner to protect himself by taking out policies against total loss only, without benefit of salvage, in respect of that part of the actual value in excess of the value agreed in the hull policies. In the present case, although the respondent followed this practice, it did not carry it far enough to

keep pace with the enormously increased value of the ship owing to war conditions. This, however, does not affect the general practice or the principle involved.

Leaving out the extraordinary circumstances of the present case, the Court can readily ascertain from the record the usual practice in these matters. The underwriters who insure against total loss only are well aware that they are not to share in any recoveries, and this understanding is ordinarily expressed in the policy (as it was in this case) by inserting a provision that it shall be "without benefit of salvage" (*supra,* p. 38). If there is any recovery, it goes to the hull underwriters; and the shipowner looks to the total loss insurance for compensation in respect of the excess value. No question of justice or equity arises; the whole matter is governed by settled custom. Everyone recognizes and concedes that the hull underwriters occupy a preferred position in the matter of recovery from third parties.

There is nothing new about the practice above mentioned. Thirty-eight years ago Judge Addison Brown referred to

> "the well-known practice of insuring against a total loss only a variety of different interests under the name of 'disbursements';—an interest so different, as to have no share in salvage on total constructive loss."

In dealing with this subject, Judge Brown went on to say:

> "The description of the subject insured, namely, 'disbursements,' it cannot be doubted, was deliberately chosen to signify a wholly different risk from that upon 'hull, machinery and equipment,' and in order to distinguish the two as wholly different classes of insurance."

International Navigation Co. v. *Atlantic Mutual Insurance Co.*, 100 Fed. 304, at page 307.

As Judge Brown recognized, the entire system of insuring against total loss only was arranged with a view to avoiding any conflict between the two classes of insurance. This could only be done by selecting for the interest insured against total loss only, some designation which would clearly indicate that the total loss only insurance was not to contribute with the hull insurance in the event of loss or share with it in the event of recovery. The fiction is that the total loss only insurance is not on the hull at all; but the actual fact is, of course, as stated in the defendant's answers in these cases, *i. e.* that insurance against total loss only is taken out on P. P. I. conditions to cover the actual value of the vessel in excess of the insured value fixed in the hull policies. Great ingenuity has been used to keep the two sets of insurance separate and guard against any claim that the total loss only insurers are entitled to share in any salvage or recovery.

The present case can be better understood by considering what would happen in a case which was not complicated by the very sudden rise in values which occurred here due to war conditions. Suppose that a shipowner has a vessel worth half a million dollars; he insures $400,000 under full hull covers in which the vessel is valued at that sum; and $100,000 under policies which are against total loss only and without benefit of salvage. His vessel is sunk in collision with another vessel, the latter being solely at fault. The assured collects half a million dollars under his policies and then collects half a million dollars from the tort-feasor, incurring legal and other expenses of $100,000. He now has in hand $900,000 as against an

actual loss of $500,000. The total loss only underwriters are admittedly not entitled to share in the recovery. On the respondent's theory, the assured would only be called upon to return to the hull underwriters $320,000—*i. e.,* the amount of their payment less their share (4/5ths) of the legal expenses. Accordingly, the assured would make a clear profit out of the loss of his vessel in the sum of $80,000 over and above the half million dollars which the vessel was worth. As the contract of insurance is a contract of indemnity the assured certainly would not be entitled to any such profit. Under the rule for which these petitioners contend, the hull underwriters would receive $400,000; both they and the assured would be made whole, and neither would receive a "windfall".

The only distinction between the case above put and the present case is that in the present case the amount of P. P. I. insurance taken out by the respondent was not sufficient to cover the difference between the insured value and the actual value. We submit, however, that the effect of the valuation clause in the policies issued by these petitioners cannot be dependent upon the amounts insured under wholly separate contracts, with which these petitioners have nothing to do. The hull policies gave the respondent permission to take out as much P. P. I. insurance as it saw fit, and the question whether it took out much or little can have no bearing on the interpretation of the hull policies. Moreover, even in the present case, the respondent pocketed a very substantial "windfall" over and above the full amount of its loss (*supra,* pp. 6 and 7).

In conclusion, we submit that the rule of *stare decisis* applies with especial force to the law of marine insurance. If the courts do not give effect to rules

long since established by judicial decisions for the interpretation of insurance policies, it becomes necessary to insert in the policies more and more provisions of an interpretative nature, so that the policies become more and more prolix and cumbersome. Whatever reason there may be for this practice in other fields, it has no justification in the field of hull insurance, which is carried on exclusively by persons trained in the customs and usages of the business. In the field of cargo insurance, for example, American policies have reached a degree of length and complexity which has been the subject of unfavorable comment abroad. *DeMonchy* v. *Phoenix Ins. Co.*, 30 Ll. L. R. 194, at page 195; 17 Asp. Mar. Cas. (N. S.) 440 at page 442. It would be most unfortunate if it became necessary for the hull policy to assume similar proportions.

This Court has pointed out the desirability of keeping the law of marine insurance uniform in England and the United States.

> *Queen Insurance Co.* v. *Globe & Rutgers Fire Insurance Co.*, 263 U. S. 487, 493.

The present is a particularly strong case for the application of this principle, since under the decision below a different rule is applicable to identical policies covering the same vessel, where they are issued by different offices of the same company. We do not suggest that American law should be changed to conform to English law, but we do submit that where the law of the United States and England has been the same for more than a generation, our Courts should not change that law in the United States excepting for reasons of the gravest importance. In this connection we refer to a case decided fifty years ago by the House of Lords, which is still one of the leading cases on the construction of marine insurance

policies, and we quote as follows from the opinion of Lord Herschell in that case:

> "I think it will be found, upon examination of the authorities, that the general words in a marine policy have received from the courts, for a long series of years, a construction to which your Lordships would do well to adhere. The instrument is one in daily use, and if your Lordships were to put a new construction upon it you would be likely to defeat, and not to give effect to, the intention of the parties. *Nothing would be more dangerous, in my opinion, than to depart from a construction which the authorities have put upon words in common use in a mercantile instrument, even if the propriety of the decision might originally have been open to question.*" (Italics ours.)

Thames & Mersey Marine Insurance Co. v. *Hamilton, Fraser & Co.*, 12 A. C. 484, at page 494.

VI.

The decree of the Circuit Court of Appeals should be reversed and the cause remanded to the District Court with instructions to enter a decree in favor of the petitioners for the balance of the amounts which they respectively paid out and for interest on the amount of their respective payments during the periods when they were deprived of the use of these funds; or in the alternative with instructions to enter a decree in favor of these petitioners for their full proportionate shares of the recovery from the United States Government, less the amounts already paid to them respectively.

Respectfully submitted,

D. Roger Englar,
T. Catesby Jones,
Oscar R. Houston,
Martin Detels.

APPENDIX A.

Analysis of payments made by respondent to English underwriters and comparison with corresponding payments made to American underwriters.

(See *supra,* footnote p. 6.)

A comparison of the sums insured by the English underwriters on vessel (English hull underwriters) with the sums insured by the English P. P. I. underwriters (Exhibit 13, R., p. 76) shows that English hull underwriters who insured £54,851 of the total English hull insurance of £61,305 (R., p. 74), also insured £43,690 (R., p. 76) of the total P. P. I. insurance amounting to £65,105 (R., p. 74). In other words, approximately 90% in amount of the English hull insurance, in addition to receiving as hull underwriters the same proportion of the recovery as was received by the American underwriters, also received about ⅔rds of the gift to the P. P. I. underwriters (R., p. 76).

The English hull underwriters as a whole, insuring a total of £61,305, received as hull underwriters a recovery of £61,248.7.6 less charges of £6,984.6.9 (Exhibit 9, p. 50), or a net recovery of £54,264.0.9; and as P. P. I. underwriters, they received a net recovery of £17,396.3.2 (43,690/65,105ths of £25,923.0.6, R., p. 76, Exhibit 9, pp. 51, 52), making a total net recovery of £71,660.3.11: which is almost 112% of the total sum of £61,305 insured by all the English hull underwriters.

However, the English underwriters who insured £54,851, or about 90% of the hull insurance placed in the English market (R., p. 76), received net as hull underwriters £48,551.5.8 (54,851/61,305ths of

£54,264.0.9), and as P. P. I. underwriters £17,396.3.2 (*supra*), making a total net recovery of £65,947.8.10, which is about 120% of the £54,851 paid by them as hull underwriters (R., p. 76).

A comparison of this 120% recovery received by 90% of the English hull underwriters, with the approximately 89% recovery received by the American hull underwriters, throws considerable light on the attitude of the English hull underwriters, about which the defendant cross-examined Mr. Grant at the trial (R., pp. 34-37).

APPENDIX B.

Extract from the recovery statement prepared by respondent's brokers (Exhibit 9, p. 4) showing negotiations which led up to the settlement with English Underwriters.

(See *supra*, p. 35.)

"Some of the English Underwriters on hull inquired as to the basis of the apportionment of the expenses and costs, and some of the P. P. I. underwriters inquired, in view of the large amount recovered, whether the owners would be willing to compensate the P. P. I. underwriters by making them some equitable refund. In respect to the first inquiry the lawyers' opinion was requested, and it has been agreed that on the basis of the Underwriters receiving the sum insured by them and the owners the excess of the recovery over and above that amount, that all expenses and costs incurred should be divided one-fifth to hull underwriters and four-fifths to the owners. The second inquiry was placed before the owners, who gave it favorable consideration and decided to re-

fund a[illegible] the P. P. I. underwriters 50% of the face of their policies less the same percentage of expenses and costs as is paid by the owners. All the points raised by the English Underwriters were thereby resolved to the mutual satisfaction of themselves and the Owners."

NOTE: *The petitioners were not parties to the agreement mentioned above* (R., pp. 42, 54, 56, 60, 61).

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Supreme Court of the United States

OCTOBER TERM, 1937.

Nos. 773, 774 and 775.

AETNA INSURANCE COMPANY,

Petitioner,

—against—

UNITED FRUIT COMPANY,

Respondent.

UNION MARINE & GENERAL INSURANCE COMPANY, LTD., formerly Union Marine Insurance Company, Ltd.,

Petitioner,

—against—

UNITED FRUIT COMPANY,

Respondent.

BOSTON INSURANCE COMPANY,

Petitioner,

—against—

UNITED FRUIT COMPANY,

Respondent.

PETITIONERS' REPLY BRIEF.

D. ROGER ENGLAR,
T. CATESBY JONES,
OSCAR R. HOUSTON,
MARTIN DETELS,
Counsel for Petitioners.

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PETITIONERS' REPLY BRIEF.

The respondent's brief appears to be based largely upon a misapprehension of the argument for the petitioners, and upon a misunderstanding of the real issues in the case. We file this reply in the hope that it will narrow the issues and avoid some of the confusion which must necessarily result when opposing arguments are not addressed to the same question.

1. Respondent mistakenly argues that the petitioners rely on the dictum in the *Armstrong* case.

On page 28 of its brief respondent says:

> "Petitioners' contention, or so much of it as now remains, is based on a dictum in *North of England Association* v. *Armstrong*, L. R. 5 Q. B. 244."

Similar statements appear elsewhere throughout the brief.

We endeavored to make it clear in our principal brief that we do not rely on the dictum in the *Armstrong* case, but only on the actual decision in that case. We rely on the law as laid down in *The St. Johns* (101 Fed. 469) and *The Livingstone* (130 Fed. 746), which followed the decision in the *Armstrong* case, but rejected the dictum in that case. We contend that these cases represent the settled law of the United States; that they are supported by the statement of this Court in *Mobile & Montgomery R. Co.* v. *Jurey* (111 U. S. 584, 594); and that there is absolutely no authority to the contrary.

2. The respondent mistakenly argues that the rule in the *Armstrong* case has no application to cases of total loss.

Throughout its brief the respondent contends that the doctrine of the *Armstrong* case applies only to cases of partial loss and has no application to cases of total loss. This argument is fundamentally erroneous and is exactly contrary to the fact. The truth of the matter is that the doctrine of the *Armstrong* case applies primarily to cases of total loss and, in the very nature of things, can very rarely apply to cases of partial loss. Under a hull policy, partial losses are paid in full by the underwriters, so that the assured is fully indemnified for his entire actual loss. The point decided in the *Armstrong* case, however, can

only arise where the assured has an actual loss for which he has not been compensated by his insurance. As a matter of fact, almost all of the cases in which the rule of the *Armstrong* case has been applied are cases of total loss. See, in this connection, *North of England Association* v. *Armstrong,* L. R. 5 Q. B. 244; *The St. Johns,* 101 Fed. 469, at page 471*; *The Livingstone,* 130 Fed. 746; *Federal Insurance Co.* v. *Detroit Fire & Marine Insurance Co.,* 202 Fed. 648; *Thames & Mersey Marine Ins. Co.* v. *British & Chilian S. S. Co.* (1915), L. R. 2 K. B. 214.

Curiously enough, in the only case we have been able to find where the principle of the *Armstrong* case was applied to a partial loss, the argument for the shipowners was just the opposite of the argument made by this respondent. They argued that the rule in the *Armstrong* case applied only in cases of total loss and could not apply to a partial loss. That contention was overruled. *Goole & Hull Steam Towing Co.* v. *Ocean Marine Ins. Co.* (1928), 1 K. B. 589, at pp. 596-7. The *Goole & Hull Steam Towing Co.* case, however, was a partial loss of a somewhat peculiar character. Although the vessel was repaired, the repairs cost more than the insured value. The case is peculiar in another respect, namely, that the recovery from third parties was effected before payment by the underwriters, and was set up by the underwriters as a credit; but we think that circumstance has no bearing on the principle involved.

As the latest decision in which the rule of the *Armstrong* case has been applied, the *Goole & Hull Steam Towing Co.* case is of particular interest, and we believe this Court will find the entire opinion of McKinnon, *J.,* worthy of careful consideration. We

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* *As appears from this citation, the respondent is mistaken in its statement that* THE ST. JOHNS *was a partial loss case.*

call attention to the following statement in the opinion (p. 594):

> "The real question in any case is: What is the measure of indemnity that by the convention of the parties has been promised to the assured? That may in some cases be less than an ideal pecuniary indemnity, in some cases it may be more. If the assured has undervalued his ship in the valuation he has agreed upon, he may find that he has suffered pecuniary loss outside the agreed indemnity."

3. The respondent's brief concedes the correctness of *The Livingstone* decision which squarely supports the argument of the petitioners.

It appears from the respondent's brief that the respondent accepts *The Livingstone* decision as correct. The respondent refers to that case as "a landmark decision" (p. 15), and says that

> "*The Livingstone* represents the true principle of subrogation" (p. 35).

At another place in its brief (p. 25) respondent refers to *The Livingstone* as a case "which has stood for years."

It appears, therefore, that both parties accept *The Livingstone* as a correct exposition of the law and only disagree as to the interpretation of that decision. We believe that this Court will have very little difficulty in determining what was decided in *The Livingstone*. The record in that case was filed with this Court in connection with the application for certiorari (No. 692. *World Marine Insurance Co. Ltd.* v. *Lackawanna Transportation Co.*, 194 U. S. 637). An exam-

ination of the pleadings and assignments of error discloses that all of the issues in the case were vigorously litigated, and that both sides claimed more than they actually received. While the proceedings on the motion for reargument are not in the record filed with this Court, it appears from the opinion below that this motion specifically brought to the attention of the Circuit Court of Appeals the fact that underwriters had been preferred in the distribution of the recovery (R., pp. 111, 112). Accordingly, it was not through mere inadvertence that the judgment actually entered was exactly in accordance with the last two paragraphs of the opinion.

In considering what was decided in *The Livingstone* it should be borne in mind that the respondent and the Circuit Court of Appeals disagree on this question. The Circuit Court of Appeals concedes that it did actually decide as the petitioners contend, and suggests, as we understand it, that the decision was not well considered. The respondent, on the other hand, apparently takes the position that *The Livingstone* was correctly decided, but that it is distinguishable from the present case.

The respondent's argument on this point is largely based on the fact that the underwriters who insured the sunken vessel ("The Grand Traverse") also insured the colliding vessel ("The Livingstone") and were liable for whatever amount her owners could be compelled to pay. That this circumstance played no part in the *Livingstone* decision clearly appears from the following passage in the opinion in that case:

> "The contention that the appellees are entitled to some consideration because they had written policies upon the 'Livingstone' by which they bound themselves to pay any loss for which she

> might become legally liable seems to us irrelevant to the present issue". (130 Fed. Rep. at p. 750).

In discussing the decision of the Circuit Court of Appeals in the present case, the respondent says (at p. 16 of its brief):

> "The Court held that the decision of *The Livingstone* was complete authority and that the Court in that case expressly approved the rules applied in this case, and that the statement in the opinion of that Court concerning payment of costs did not involve any ruling on the question of subrogation."

After repeated and painstaking examinations of the opinion of the Circuit Court of Appeals in the present case, we can find no justification whatever for the foregoing statement. Our understanding is that the court below recognized that its decision in this case was contrary to its decision in *The Livingstone.*

The respondent seems to attach a great deal of significance to the fact that, in the present case, counsel were jointly retained by the hull underwriters and the respondent, to prosecute the collision suit. We are unable to follow respondent's argument on this point. The underwriters were entitled to proceed in the name of the respondent, *U. S.* v. *American Tobacco Co.,* 166 U. S. 468 at page 474. The respondent also had an interest in the litigation; first, because of the line which it carried as a self insurer, and second, because of the possibility that the litigation might result in a surplus to which the respondent would be entitled under the rule laid down in *The St. Johns* and *The Livingstone.* Under these circumstances the manner in which the litigation was begun and prosecuted was most appropriate.

4. It is impossible to ascertain from the respondent's brief what method of adjustment it considers correct.

Where the agreed valuation and the amount of insurance are less than the actual value of the insured vessel, there are three possible methods of dividing a recovery from third party tort feasors.

(a) The first possible method is to allow the assured to retain any recovery until he has been fully reimbursed for the actual value of the vessel, so that the underwriters receive only the surplus, if any, which remains after the assured has been fully reimbursed. So far as we are aware, no one contends or has ever contended for this method of apportionment in any marine insurance case.

(b) The second possible method of adjustment is to treat the assured and his underwriters as coinsurers, apportioning the recovery over the entire actual value of the vessel and ignoring the agreed valuation. So far as we know, this method of apportionment has never been adopted or even seriously considered in connection with hull insurance prior to the present case, but in this case the Circuit Court of Appeals seems to have had some such method in mind. The question necessarily remains in doubt because the actual result of the Circuit Court of Appeals decision was a sort of compromise between this method of apportionment and the method described in the preceding paragraph. The assured more than repaid itself in full, but repaid its underwriters only about 89% of their loss. Counsel for the assured take an equally inconsistent position in this Court; they seem to favor the co-insurance theory, but they seek to defend an apportionment under which the assured fares better than any of the underwriters. By assuming a state of facts contrary to the pleadings (*cf.*

Respondent's Brief, pp. 5, 6, 7 and Petitioners' Brief, p. 36), respondent attempts to demonstrate that the total amount which it received was some $71,000 less than the actual value of the vessel, instead of approximately the same amount in excess of her actual value, as shown in petitioners' brief (pp. 3 to 6).* But, even accepting these figures, the respondent's percentage of loss on the excess of actual over agreed value (about 6⅓%)** is substantially less than the underwriters' percentage of loss on the insured value (about 11%). In other words, the respondent cites no authority for the co-insurance method of apportionment, and did not even follow that method in this case. Furthermore, as we shall point out, some of respondent's statements are wholly inconsistent with the co-insurance theory.

(c) The third possible method of dealing with such a recovery is to apply the recovery first to the reimbursement of hull underwriters. This is the method followed in the *Armstrong* case, *supra; The St. Johns, supra; The Livingstone, supra* and the *Federal Insurance Company* case, *supra,* and we know of no

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*Even on the respondent's own figures, it would have received payment in full excepting for the payment ($85,999.64) which it made to English P. P. I. underwriters, and which it was admittedly under no legal obligation to make. Furthermore, the item of "recovery for interests other than hull", on page 6 of respondent's brief, includes $11,693.02, recovered in respect of equipment which was unquestionably a part of the subject matter insured (see note on p. 4 of our principal brief) and was so treated by the respondent's brokers (p. 42 of Recovery Statement, Exhibit 9). By its ingenious treatment of the two items above mentioned, aggregating $97,692.66, the respondent turns a profit of $26,408.21 into a loss of $71,284.45. If the respondent had chosen to increase its gratuity to the English P. P. I. Underwriters by, say, an additional $100,000, its loss would, on its theory, have been just so much greater.

**Respondent's alleged net loss, $71,284, divided by $1,117,390 (the excess of actual value, $1,750,000, over agreed value, $632,610).

case in which any other method of apportionment has ever been applied to hull insurance. Where the actual recovery exceeds the amount required for the complete reimbursment of underwriters, a special question is presented as to the disposition of the surplus. On this question we have the dictum in the *Armstrong* case that the surplus belongs to the underwriters; the dictum in *The St. Johns* that it belongs to the assured; and the decision in *The Livingstone*, to the same effect as the dictum in *The St. Johns*.

If the foregoing discussion is longer and more detailed than might be expected in a reply brief, we can only say, in justification, that the respondent's brief contains a number of statements which we find definitely confusing. Thus respondent states in its brief (p. 14) that underwriters pay partial losses in full, whereas in cases of total loss "they pay merely the total amount of the policy", and then goes on to make the following statement:

> "In the case of such total loss the underwriters are subrogated to any recovery to the extent of the amount paid under their policies, and the owner is entitled to the balance. *The Livingstone* (C. C. A. 2), 130 Fed. 746."

We are unable to understand how the respondent can reconcile the foregoing statement with the coinsurance theory, or indeed, with any theory which denies to the underwriters priority in the distribution of recoveries. The passage above quoted is a correct (although incomplete) statement of the rule applied in *The Armstrong* case and in *The St. Johns*.

Later on, the respondent says (at p. 22 of its brief):

> "If the underwriter pays 100% of the loss, he owns the entire cause of action; if he pays 50%

of the loss, he owns half the cause of action and the assured owns the other half."

The only loss with which the underwriters is concerned, of course, is the loss of the agreed value; and his share in the recovery is determined by comparing the amount of his payment with the insured value.

5. The principles laid down in *The St. Johns* and *The Livingstone* are not limited to cases where the recovery is less than the insured value. These principles apply to the present case and are controlling of all of the issues presented on this appeal.

The respondent's argument appears to proceed on the theory that cases where the net recovery exceeds the agreed valuation fall in a separate class and involve wholly different principles from those cases where the net recovery is less than the amount which has been paid out by underwriters. We submit that there is no such distinction. Where the amount sued for (*i. e.,* the actual value) is greater than the agreed valuation, the question necessarily arises whether the recovery is to be apportioned over the actual value or the insured value; *i. e.,* whether the underwriters are to be treated as co-insurers with the assured or as having a prior right in the recovery. In every case where the question has arisen squarely under a hull policy, it has been held that the underwriters have a prior right of reimbursement. The only limitation on that right is the equitable limitation suggested in *The St. Johns* and applied in *The Livingstone.* That limitation has nothing to do with co-insurance but is based on a purely equitable principle. In effect, the rule of *The Livingstone* treats the underwriters as in possession of the entire recovery, but holds that after they have been fully reimbursed they hold any surplus in trust for the assured. This resulting trust at-

taches only to any surplus which, in the hands of the underwriters, would constitute a profit on the transaction. This principle is expressed in *The Livingstone* opinion as follows:

> "The title of the insurers, by virtue of the valued policies, abandonment and conveyance, to the physical property and to salvage, may well be conceded, as may also their right to share in the recovery to the extent of full and complete reimbursement for all losses and expenditures made by them incident to the insurance. We are fully convinced that equity and good conscience do not require the court to go further and permit them to realize an enormous profit from the transaction" (130 Fed. Rep. at p. 751).

When *The Livingstone* decision is properly understood, the right of the petitioners to receive interest is clear. It is equally clear that all expenses of the litigation must come out of the fund and that none of such expenses can be deducted from the interest of the petitioners. This necessarily follows from the nature of the limitation applied in *The Livingstone*, which does not come into operation until the underwriters have received "full and complete reimbursement".

Throughout its brief the respondent minimizes the importance of the agreed valuation, and harps upon the supposed hardship to which the respondent would be subjected if the claim of the petitioners were sustained. Obviously there is no merit in this sort of argument if the petitioners are correct in their claim that the meaning and effect of the valuation clause is well settled and well understood. As Judge Addison Brown pointed out many years ago, shipowners undervalue their vessels for definite reasons of econ-

omy, and they can have no complaint when the underwriters exercise equally definite rights which accrue to them by virtue of the undervaluation. Respondent denies that the decision in the *Armstrong* case has ever been generally accepted, but it does not cite a single instance where any shipowner has received a dollar out of any recovery from third parties until the hull underwriters had been fully reimbursed. Respondent cites no decision in its favor because there is none; and although its insurance is handled by very able and prominent brokers, it did not put them on the witness stand to testify to any custom or practice to apportion recoveries contrary to the *Armstrong* decision, nor did it even undertake to prove an isolated instance of any such apportionment. There is only one possible explanation of respondent's failure to offer evidence on this point, and that explanation is the true one, *i. e.*, that the rule of the *Armstrong* case, *The St. Johns* and *The Livingstone* has been universally accepted, and any reputable broker or underwriter would have to admit that fact if placed on the witness stand.

6. There is nothing in the decision of this Court in *The Gulf Refining Co.* v. *Atlantic Mutual Insurance Company* which lends support to the respondent's argument.

The respondent argues that in the *Gulf Refining Company* case (279 U. S. 708) this Court overruled Judge Addison Brown's decision in the case of *International Navigation Co.* v. *Atlantic Mutual Insurance Company,* 100 Fed. 304. We submit that there is no foundation for this argument. The *International Navigation Company* case followed the New York rule as to the adjustment of general average losses under hull policies. In the *Gulf Refining Co.* case this Court noted the fact that a different rule pre-

vailed in Massachusetts and pointed out that this Court had never adopted either rule. The question can scarcely be material in the present case, since the policies here involved expressly provide for the application of the New York rule (see our Principal Brief, p. 38). As the policies were all issued in New York the incorporation of the New York rule was entirely natural and proper.

Furthermore, the question how salvage and general average claims are to be adjusted has no necessary connection with the question how collision recoveries are to be apportioned. It is well-settled in all jurisdictions that claims for physical damage are paid in full to the amount insured; and where a vessel is physically destroyed, the rule of the *Armstrong* case may well be applied without reference to the method of settling salvage and general average claims. Indeed, the law in England is that recoveries are distributed in accordance with the decision in the *Armstrong* case, notwithstanding that salvage and general average claims are settled in accordance with the rule applied in the Massachusetts cases. See, in this connection, the opinion of this Court in the *Gulf Refining Company* case (at pp. 713-14), and the opinion of Scrutton, *J.*, in *Thames & Mersey Marine Insurance Co.* v. *British & Chilian S. S. Co.*, L. R. 2 K. B. 214 at page 221. In any event, even if it be true as suggested by Scrutton, *J.*, that there may possibly be some inconsistency between the reasoning of the *Armstrong* case and the English rule for adjusting hull general average claims (which is the same as the Massachusetts rule), that difficulty cannot arise in the present case, where the policies were issued in New York and stipulate for the New York rule.

The respondent seems to have misread the *Gulf Refining Company* case in other respects. Thus the respondent says in its brief (at p. 43):

> "Except in peculiar cases of partial loss in hull insurance the *Armstrong* error has never been accepted. This Court refused to follow it in a cargo case in which the principle of the *Armstrong* case was directly asserted. *Gulf Refining Co.* v. *Ins. Co.*, 279 U. S. 708."

The *Armstrong* case was not even mentioned by this Court in the *Gulf Refining Company* case, and we cannot understand how the principle of the *Armstrong* case could possibly be involved in the *Gulf Refining Company* decision.

The respondent's brief also states (at p. 44) that the Judge who decided *The St. Paul* case

> "failed to appreciate the fact, now well settled, that the agreed valuation is only a stipulation for liquidated damages."

This statement is not true even where the assured is a co-insurer, as under a cargo policy. In discussing the rule for the settlement of cargo losses, this Court said, in the *Gulf Refining Company* case (at p. 710):

> "It recognizes that the purpose of valuing the cargo is not to fix the maximum amount of recovery, which is accomplished by limiting the amount of the policy, but to eliminate from the risk which the insurer assumes so much of it as is consequent upon fluctuations of the market value of the cargo, whether the loss be total or partial."

Respondent lays stress on the statement of this

Court in the *Gulf Refining Company* case, that the effect of the agreed value is not dependent on estoppel. It is quite true, as this Court said in the *Gulf Refining Company* case (at p. 712) that:

> "The policy agreement valuing the cargo at a specified amount is not a representation, or so regarded. It is no more than a stipulation, in effect, that for purposes of computation of the insurance liability the cargo shall be taken at an agreed value."

A stipulation, however, is just as effective as an estoppel. Technically they are quite different, but the word "estoppel" is very often loosely used as a means of expressing the fact that a person is not free to take a position contrary to his contractual stipulations.

Respondent's brief states (at p. 51) that the respondent

> "expressly promised to pay the repair bills, up to the amount of their policies, in case of partial loss, * * *"

This statement appears to be based upon a misconstruction of this Court's decision in the *Gulf Refining Company* case, and of the clause in the hull policies quoted at the bottom of page 13 of the respondent's brief. That clause relates entirely to "charges and expenses". It has nothing to do with physical damage. So too, the opinion of this Court in the *Gulf Refining Company* case did not suggest that there was any question about the liability of hull underwriters to pay repair bills in full. The only question left open related to "charges and expenses", such as salvage and general average.

Finally, in any discussion or consideration of the

Gulf Refining Company case it must be borne in mind that it dealt with cargo insurance, and that it did not involve in any way the distribution of recoveries from third parties. There is nothing in the opinion in that case to support the following statement made in the respondent's brief (p. 48):

> "Every argument advanced by the petitioners was advanced in *Gulf Refining Co.* v. *Ins. Co.*, 279 U. S. 708, and all were refuted by this Court."

7. The permission to place additional insurance has no bearing on the construction of the valuation clause.

A considerable part of respondent's brief is devoted to the argument that when the hull underwriters waived any limitation on the amount of insurance which the respondent could take out on disbursements, etc., they indicated an intention to deal with the respondent as a co-insurer and apportion recoveries over the actual as distinguished from the agreed value. Whatever plausibility this argument may have, arises from a confusion of ideas in which the persons who placed the insurance evidently did not share. The permission granted by the underwriters was to insure "Disbursements and/or other interests". No doubt this language is literally broad enough to cover additional insurance on hull, but there are good reasons why it could not be so interpreted in practice, and it was not so interpreted in this case. The parties evidently understood that this clause was not intended as a permission to place other insurance on a parity with the hull insurance, but was intended to permit placing of the usual insurance against total loss only and without benefit of salvage. Under such policies it is immaterial how the interest insured is described, but it is to be noted that the only description specified in the permissive clause

was "disbursements". The permission to place the insurance and the actual method of placing it fit in precisely with Judge Addison Brown's reference to

> "the well-known practice of insuring against a total loss only a variety of different interests under the name of 'disbursements'; an interest so different, as to have no share in salvage on total constructive loss." (Petitioner's Principal Brief, p. 44.)

That the parties did not have in mind that the respondent would place additional insurance on hull is sufficiently plain when it is considered that the collection of such insurance would have afforded a defense *pro tanto* to the original hull underwriters, including these petitioners.

> "It is not denied that in an action on a valued policy the defendant may show in defense that the insured has already received the agreed value stated in the policy sued on from other insurers of the same identical interest." *The Fern Holme*, 46 Fed. 119, at p. 120; affirmed 50 Fed. 613, at p. 615.

The above rule has long been the settled law of England (where about half of the hull insurance on the "Almirante" was placed), and is incorporated in the (English) Marine Insurance Act of 1906,* Section 32, subdivision (2)(b), as follows:

> "Where the policy under which the assured claims is a valued policy, the assured must give credit as against the valuation for any sum received by him under any other policy without regard to the actual value of the subject-matter insured."

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* 6 Edw. 7, c. 41.

In view of this rule it would have been foolhardy for the respondent to place additional hull insurance in reliance on a permission to insure "disbursements and/or other interests", without any provision as to the relation between such additional insurance and the original hull insurance. It is plain that the parties intended that the respondent should do what it actually did; that is, place the additional insurance in a form which would not conflict with the hull insurance, thus following "the well-known practice" to which Judge Brown refers, and which was followed in *The Fern Holme, supra.*

Although the interest insured is differently described in the various P. P. I. policies (R., pp. 43, 45, 47, 49) it is to be noted that in the recovery statement they are all lumped together and treated alike, without any reference to the description of the subject-matter insured (Exhibit 9, pp. 4, 43-45, 51-52), and they are similarly dealt with in paragraphs 3 and 5 of the stipulations of agreed facts (R., pp. 40, 52, 57, 58). In paragraph 10 of its answers (R., pp. 9, 16, 23), respondent refers to all the P. P. I. policies as being "upon the SS. 'Almirante' for increased valuation."

8. The respondent makes a number of statements which are not supported by the record.

The respondent states (at p. 12 of its brief) that "the policies of Hull insurance involved in this litigation were unusual." There is nothing in the record to support this statement. The policies show that they were specially printed to cover the vessels of this respondent, as they bear its name and contain a list of the vessels insured.* So far as the terms of the

* We refer to the special policy form bearing the respondent's name. By the last paragraph of this form it supersedes the policy forms to which it is attached, and which are different in the case of each company.

coverage are concerned, however, there is not the slightest indication that the policies were unusual.

Respondent says that the petitioners claimed the entire recovery in the lower court (Petitioner's Brief, p. 28), while the lower court says we did not claim the whole recovery there but reserved the right to make such a claim in this Court (R. 108-9). Under these circumstances we trust that we may be permitted to state our actual position which has been from the beginning, and still is, that we consider the law settled by *The St. Johns* and *The Livingstone*. If, however, those cases are not binding and the entire question is reopened, we naturally reserve the right to take any position which can be supported by reason or precedent.

Respondent criticizes our treatment of the interest which the respondent carried as a self insurer. In this particular we merely followed the recovery statement prepared by respondent's brokers (Exhibit 9, p. 44). This treatment of respondent's retained line is also supported by the case of *Thames & Mersey Marine Insurance Co.* v. *British & Chilian S. S. Co., supra,* which the respondent cites in its brief. In that case (at p. 220) Scrutton, *J.*, contrasts *The Commonwealth* (1907) P. 216, and the *Armstrong* case, *supra,* thus bringing out very clearly the difference between an uninsured portion of the agreed value and an uninsured actual value in excess of the insured value.

We think this Court cannot fail to be impressed by the respondent's princely gesture in handing to the English P. P. I. underwriters a gratuity of $85,999.64 as "an act of grace" (Respondent's Brief, pp. 5, 11). As compared with this explanation we asked the Court to consider the explanation set forth in Appendix A attached to the petitioners' principal brief. After making this comparison the Court will

be in a position to decide whether the payment to the P. P. I. underwriters was prompted by a mere impulse of generosity or by a desire to buy off the English hull underwriters and prevent their joining the American underwriters in this litigation.

9. None of the cases cited by the respondent actually supports its argument.

To discuss each of the numerous cases cited by the respondent would unduly enlarge this reply, and we think such discussion is unnecessary. Respondent cites not only cases involving cargo, but cases involving surety bonds, fire insurance, insurance on real estate titles and automobile insurance. The one thing it does not cite is a case which deals with the precise question involved here, and decides it in accordance with the respondent's contentions.

The respondent cites the case of *Goole & Hull Steam Towing Co.* v. *Ocean Marine Ins. Co., supra,* as a case which criticizes the decision in the *Armstrong* case. As a matter of fact, the case does nothing of the sort. McKinnon, *J.,* unlike respondent in the present case, distinguishes carefully between the decision and the dictum in the *Armstrong* case, and while he recognizes that the dictum may be open to question, he does not intimate the slightest disagreement with the actual decision.

The respondent cites *Brown* v. *Merchant Marine Insurance Co.,* 152 Fed. 411, for the proposition that underwriters against total loss only are entitled to share in a recovery from third parties. That case appears to have gone off very largely on the question whether P. P. I. policies were necessarily illegal in the United States. The reasoning on which the Court based the apportionment between two different sets of underwriters is somewhat obscure, but that issue

is wholly irrelevant in the present case. On the other hand, we submit that the case affords a convincing demonstration of the wide and final acceptance of the *Armstrong* decision in this country. Although the assured in the *Brown* case had a large uninsured interest, consisting of the actual value of the vessel over and above the sum total of the insurance, it was never suggested that the assured had or could have any interest in the recovery.

10. The receipts which the respondent delivered to some of the petitioners have no bearing on the issues in this case.

In the pleadings respondent sets up the terms of certain receipts which were delivered to the petitioners some weeks after the payment of the loss. The lower courts considered these receipts immaterial, but as the respondent refers to them in its brief in this Court, we consider it necessary to deal with them here.

No subrogation receipt was taken in the case of the Aetna Insurance Company; but such receipts were taken in the cases of the other two companies, namely, The Boston Insurance Company and The Union Marine Insurance Company. At the outset it is important to bear in mind that these receipts were not signed by the petitioners (the insurance companies) but by the respondent; that they were not even presented to the petitioners until long after they had paid a total loss under their policies; and that the alterations in the printed forms were all made by the assured, or its brokers, without consulting the petitioners (R., pp. 55-57, 61-62, 52, 58).

The insurance companies acquired whatever rights they have at the moment when they paid the respondent the sums insured by their policies in full payment of a total loss. The Boston Insurance Com-

pany paid a total loss on or about December 16, 1918; and the Union Marine Insurance Company paid a total loss on or about December 5, 1918 (Stipulations, pars. 4). The subrogation receipts were not signed by the respondent until January 28, 1919 (Exhibits Annexed to Supplemental Stipulations). The relative dates clearly appear, in the Boston case for example, by a comparison of the date on the receipt, Exhibit 6 attached to the original stipulation (Exhibit 2), and the date on the subrogation receipt attached to the supplemental stipulation (Exhibit 3). In the latter, the date of the actual payment was originally written in; but this was crossed out, and the later date substituted.

It is obvious that the form of the printed subrogation receipt is not appropriate for a case in which an underwriter insures only a proportion of the agreed value, since the assured could not assign to each of the interested underwriters the entire right of recovery. Probably a careful lawyer would have modified the receipt by inserting a fraction, of which the numerator would be the amount insured, and the denominator would be the insured value (see passage quoted from Respondent's Brief, *supra,* pp. 9, 10). No doubt this same result was sufficiently indicated to business men by inserting the amount insured. Certainly it would never occur to an underwriter that the insertion of this amount in the printed form would deprive him of rights which he had acquired by a payment made a month before.

The provision with respect to costs and expenses in the receipt sent to the Union Marine Insurance Company clearly has no application to the present case. Quite apart from the fact that the document is not signed by the insurance company, we call attention to the fact that the last sentence is merely an agreement by the insurance company to indemnify the ship-

owner against any expenses "incurred in respect of any proceedings taken by virtue of this agreement". This language refers back to the opening words of the sentence, in which the shipowners agree "if called upon" to undertake any action or proceeding on behalf of the underwriters. There is no suggestion that the shipowners were ever called upon by the underwriters to proceed under this agreement, nor that the proceedings were actually taken pursuant to any such agreement. The stipulated fact is that the parties jointly retained counsel to represent their respective interests. Of course, if there had been no recovery, each client would have been responsible to the attorneys for its respective share of the expense. This result would follow, not from the printed form of subrogation receipt, but from the several individual and independent retainers.

In any event, it was of no importance, under the *Livingstone* decision, whether or not the petitioners contributed to the legal expenses. If they did so contribute, their contribution would merely be added to the amount they would be entitled to receive and retain out of the recovery.

The rights of the petitioners were fixed when they paid a total loss a month before the receipts were altered or signed:

> "From the very nature of the contract of insurance as a contract of indemnity, the insurer, upon paying to the assured the amount of a loss, total or partial, of the goods insured, becomes, without any formal assignment, or any express stipulation to that effect in the policy, subrogated in a corresponding amount to the assured's right of action against the carrier or other person responsible for the loss; and in a court of admiralty may assert in his own name that right of the

shipper. *The Potomac,* 105 U. S. 630, 634; *Phoenix Ins. Co.* v. *Erie Transportation Co.,* 117 U. S. 312, 321."

Liverpool Steam Co. v. *Phenix Ins. Co.,* 129 U. S. 397, at page 462.

The Circuit Court of Appeals for the Sixth Circuit said in *Federal Insurance Co.* v. *Detroit Fire & Marine Insurance Co.,* 202 Fed. 648, at page 651:

> "Most of the insurers obtained subrogation receipts from the owner upon paying their shares of its loss, some of which in terms provided for full subrogation, and others 'to the extent only and as provided in' the policies, although the policies do not appear to have contained any provision for subrogation. However, we do not regard this as important, nor do counsel for either side, because it is settled that such provisions are not necessary. The right of subrogation arises from the very nature of the contract of insurance as a contract of indemnity. *Phoenix Ins. Co.* v. *Erie Transportation Co.,* 117 U. S. 312, 321, 6 Sup. Ct. 1176, 29 L. Ed. 873; *Liverpool Steam Co.* v. *Phenix Ins. Co., supra,* 129 U. S. 462, 9 Sup. Ct. 469, 32 L. Ed. 788; *North England Ins. Ass'n.* v. *Armstrong,* L. R. 5 Q. B. 244; *Comegys* v. *Vasse,* 1 Pet. 193, 212, 7 L. Ed. 108."

See also:

Phillips on Insurance (§1723);
Atlantic Insurance Co. v. *Storrow,* 5 Paige 285;
Joyce on Insurance (§3538).

The alterations in the receipts were made by the brokers, and were never seen by the insurance com-

panies until long after the payment of the loss; it is not claimed that the petitioners agreed to them (R., pp. 56, 61).* The retention of the altered receipts by petitioners could not be a waiver of any of their rights, since no consideration is shown or even claimed for such a waiver; nor is there any claim of estoppel, as it is not even suggested that the respondent ever changed its position because of these receipts. The petitioners were under no duty to protest if the receipts were inaccurate. They could have torn up the receipts and thrown them away if they saw fit. Their claim is not based on the receipts and cannot be affected by these receipts, which came to hand long after the rights of the petitioners were fixed.

The answers allege that the payments were made "under and pursuant to the following subrogation agreement". The stipulated facts, however, show clearly that there is no foundation for this statement. The payments were made under and pursuant to the terms of the insurance policies; and no receipt was taken at the time excepting the plain receipt attached to the payment order, which appears as Exhibit 6 attached to the principal stipulation in the Boston case (R., p. 55).

If the circumstances surrounding the alteration of these receipts and their subsequent return to the insurance companies were such as to make the altered

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* The copy of the Union Marine Insurance Company receipt shown at page 62 of the record is a printed copy instead of a photostatic copy, and therefore does not show that the words "to the extent of but not exceeding $6326" appearing twice therein, were the handwriting insertions added by Johnson & Higgins, referred to in paragraph 1 of the stipulation of facts (R., p. 61). The respondent has agreed, however, that we may state that fact to the Court, and we have a certified photostatic copy which we can file with the clerk if necessary.

form of the receipts in any way binding on the petitioners, the respondent would undoubtedly have offered some evidence to that effect. As the case stands, however, we have nothing but the bare fact that these documents were altered and returned to the insurance companies many weeks after the latter had paid a total loss. The receipts were of no importance and no attention was paid to them by either of the parties until the present litigation arose, when it was feebly suggested that perhaps the petitioners should have returned the receipts or protested against them. The petitioners were under no such duty and their failure to protest was quite unimportant. As the District Court correctly held, the receipts are wholly without significance.

Dated, New York, April 22, 1938.

Respectfully submitted,

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T. Catesby Jones,
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Martin Detels,
Counsel for Petitioners.

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Supreme Court of the United States

OCTOBER TERM, 1937.

Nos. 773-774-775.

AETNA INSURANCE COMPANY,
Petitioner,
against
UNITED FRUIT COMPANY,
Respondent.

UNION MARINE & GENERAL INSURANCE COMPANY, LTD.,
formerly Union Marine Insurance Company, Ltd.,
Petitioner,
against
UNITED FRUIT COMPANY,
Respondent.

BOSTON INSURANCE COMPANY,
Petitioner,
against
UNITED FRUIT COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

CHARLES EVANS HUGHES,
EDWARD KENNARD,
Counsel for Respondent.

Supreme Court of the United States

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BOSTON INSURANCE COMPANY,
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against

UNITED FRUIT COMPANY,
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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The respondent, United Fruit Company, opposes the issuance of a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit entered

November 15, 1937, reversing in part and affirming in part judgments of the Southern District of New York. R. 113, 127 and 141. The effect of the judgment of the Circuit Court of Appeals is to dismiss three complaints at common law by Marine Underwriters against their assured, the respondent, for the recovery of certain monies by way of subrogation.

Jurisdiction.

The decree on mandate went down November 30, 1937. Jurisdiction is provided by 28 U. S. C., s. 347 (a).

Opinions Below.

The unanimous opinion of the Circuit Court of Appeals (L. Hand, writing, Swan, A. N. Hand) is printed at page 163 of the record and is reported 92 F. (2d) 576; 1938 A. M. C. 22.

The opinion of District Judge Patterson is printed at page 100 of the record and is reported 18 F. Supp. 441; 1937 A. M. C. 78.

Questions Presented.

The petition presents three consolidated actions at law brought by Marine Underwriters against their assured, United Fruit Company, for *additional payments* by way of subrogation out of funds recovered from the United States for the loss of the insured vessel, the *Almirante*.

Respondent, before suit, had paid each Underwriter the amount of the loss it had paid on its policy, less a proper share of the expense of recovery from the United States, without interest, because no interest was recovered from the United States. The Court below approved this adjustment as fair and equitable and in accord with the settled insurance practice.

Petitioners claim that because there was an agreed valuation clause in the policy they are entitled to recover interest on their payments and to be relieved of the payment of legal expenses for their own lawyers.

They appear to have abandoned their additional claim to the profit which recovery of the whole fund would give them.

The Facts.

Although the facts in this case have been stipulated, the statement of the facts contained in the petition does not accurately reflect the contents of the record.

On May 1, 1918 the United Fruit Company took out a number of policies on its *S. S. Almirante* with American and British Underwriters.

The policies were unusual. The usual form of policy issued by the various underwriters was entirely supplanted by a special printed rider, which was prepared solely for the coverage of respondent's vessels.

Such rider contained a valuation clause in the amount of $632,610. As the petition discloses, the printed rider contained many clauses not contained in the usual policy.

Each of the petitioners assumed part of American insurance placed, amounting to $284,673. The English Hull insurance amounted to $297,329.25.

The Fruit Company paid a substantial premium for this insurance.

In addition, in order to cover disbursements and other miscellaneous losses which an owner always incurs in connection with a total loss of a ship, such as loss of freight and future earnings, disruption of business, etc., and which are not taken care of by a recovery of any part of the value of a ship, the United Fruit Company took out with English underwriters, "P. P. I."[1] policies amounting to $173,945.25.[2]

In addition, the respondents took out English "P. P. I." policies on the increase value of hull and machinery amounting to $141,614.

The *Almirante* was lost in a collision with the *S.S. Hisko,* owned by the United States, on September 6, 1918. The insurance companies paid the respondent the face value of their policies for the total loss. Thereafter the Hull Underwriters, including the petitioners, and the United Fruit Company *jointly* retained attorneys to prosecute the claim for damages occasioned by the loss of the *S.S. Almirante* against the United States of America. After the passage of

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[1] These letters stand for Policy Proof of Interest.

[2]

"Disbursements and Excess Liabilities" (Exhibit 2, R. 66, 2 pages, attached Stipulation, Plaintiffs' Exhibit 1, R. 59)	£27,740
"Freight" (Exhibit 3, R. 68, 2 pages, attached Stipulation, Plaintiffs' Exhibit 1, R. 59)	£ 5,625
"Disbursements" (Exhibit 4, R. 70, 2 pages, attached Stipulation, Plaintiffs' Exhibit 1, R. 59)	£ 2,500
	£35,865
@ $4.85	$173,945.25

a Special Act and extended litigation, the attorneys retained *jointly* by the petitioners and respondent recovered $1,761,693.02 as the actual value of the *S.S. Almirante* and her equipment at the time of the loss. No interest was recovered from the United States. Reasonable legal and other expenses amounted to $300,024.33.

In accordance with the usual custom, Messrs. Johnson & Higgins were employed to prepare a Recovery Statement, Exhibit 9. In accordance with this Statement, the attorneys acting jointly for the petitioners and respondent paid each insurance company the amount it had paid on its policy, less a proportionate share of legal expenses incurred by the insurance company and without any payment of interest, because no interest was recovered from the United States.

Each Hull underwriter, including the petitioners, received exactly the amount it paid in 1918, less the exact cost paid to their own attorneys for collecting the sum from the United States. Neither the Hull underwriters nor the United Fruit Company received any interest, because no interest was recovered, and consequently there was no interest for the attorneys or Fruit Company to account for.

The precise situation, therefore, with respect to the Fruit Company's loss of the vessel and recovery from underwriters and the United States was as follows:

Value of Vessel September 6, 1918 (Ex. 9, p. 27)			$1,750,000.00
Paid by American Hull Underwriters		$284,673.00	
Paid by British Hull Underwriters £61,305 @ $4.75¾ (Supplemental Stipulation, par. 3, Plaintiffs' Exhibit 5, f. 265)		$291,658.53	
Paid by English P.P.I. Underwriters, Increased Value Hull and Machinery, £29,240 @ $4.75¾ (Supplemental Stipulation, par. 3, Exhibit 1, R. 64, attached to original Stipulation). Plaintiffs' Exhibit 5, f. 265		$139,109.30	
Recovered from United States for owners	$976,288.10		
Less Recovery for interests other than Hull	13,013.38	963,274.72	
Total received by Fruit Company for Hull			$1,678,715.55
Net Loss of Fruit Company on whole transaction, without taking into account interest or premiums paid underwriters[1]			$ 71,284.45

[1] Plaintiffs' calculation of owners' loss not only ignores premiums paid by owners and interest lost by owners but includes as a recovery for hull, certain insurance on risks other than hull. This is apparent from examination of the policies. See f. n. 2, page 4, *supra*.

It is obvious, therefore, that the respondent shipowner has suffered a loss of a large amount, for which it is unindemnified.

The petitioners, insurance companies, seek to recover from the owner large amounts which will greatly increase the loss suffered by the insured respondent.

Reasons for Opposing the Petition.

1. The petition presents the question of the construction of a special Hull policy written before the Spring of 1918. As the petition indicates by the quotation of a number of unusual terms of the policy, the policy was not a regular policy used by underwriters generally, but was a special form prepared by an insurance adjuster for the coverage of respondent's vessels. The interpretation of such an ancient document by this Court would serve no useful purpose.

Underwriters ordinarily write their own policies and are well able to make such a contract as they choose to cover the circumstances of a case such as this.

If they do not like the present decision they have only to change the wording of their policies which they have done many times since 1918.

There have been only two cases in the history of American and British Maritime Law where there has been a recovery from a tort feasor in excess of agreed valuation, and both of these cases were in the Second Circuit. The first was *The Livingstone,* 130 Fed. 746; the second is this case. The decision below, therefore, involves an obscure question of marine insurance so rare as to be almost academic.

The petitioners admit that there are no other cases involving similar facts. It is apparent, therefore, that their allegation of conflict is without merit. All of the cases referred to by the petitioners are *partial loss cases*. The law of those cases is not affected by this decision, which is carefully confined to cases of *total loss* where the recovery is in excess of the agreed valuation.

The petition, therefore, fails to state any ground for granting certiorari. The question of the proper rule in partial loss cases may come before the Court on some other occasion. Such question is not presented on this record, and all of the decisions cited in the petitioners' brief are on an issue not here present.

Petitioners' brief is based almost entirely on a decision of the Southern District of New York. *International Navigation Co.* v. *Atlantic Mutual Ins. Co.*, 100 Fed. 304.

The inapplicability of that decision to the facts presented by this case has been twice pointed out by the Circuit Court of Appeals for the Second Circuit. The correctness of the decision of the District Court in that case has been doubted by the Circuit Court of Appeals and inferentially questioned by this Court in *Gulf Refining Co.* v. *The Atlantic Mutual Ins. Co.*, 279 U. S. 708.

Petitioners in this case are underwriters who received a substantial premium from the respondent, their assured, for promising indemnity to the assured. A loss occurred and the respondent has suffered damage for which it has never at any time been fully indemnified. The underwriters seek to increase the loss suffered by the insured by recovering interest which the assured never received and by recovering from the assured legal expenses which the petitioners incurred by retaining their own counsel. The claim

of the petitioners is contrary to the repeated decisions of this Court that the *assured* is to be first indemnified, and not the underwriters.

It is submitted that the opinion below was correct and in accord with general marine insurance practice. The insurance policy is obsolete and, the circumstances, in any event, highly unusual. It is respectfully submitted that there is no occasion for the review of the decision of the Circuit Court of Appeals.

Respectfully submitted,

CLETUS KEATING,
RICHARD SULLIVAN,
Counsel for Respondent.

Dated: March 1, 1938, New York, N. Y.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937—NOS. 773-775.

AETNA INSURANCE COMPANY,
Petitioner,
against
UNITED FRUIT COMPANY,
Respondent.

UNION MARINE & GENERAL INSURANCE COMPANY, LTD.,
Formerly Union Marine Insurance Company, Ltd.,
Petitioner,
against
UNITED FRUIT COMPANY,
Respondent.

BOSTON INSURANCE COMPANY,
Petitioner,
against
UNITED FRUIT COMPANY,
Respondent.

BRIEF FOR RESPONDENT.

CLETUS KEATING,
RICHARD SULLIVAN,
Counsel for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937—Nos. 773-775.

AETNA INSURANCE COMPANY,
Petitioner,

against

UNITED FRUIT COMPANY,
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UNION MARINE & GENERAL INSURANCE COMPANY, LTD., formerly Union Marine Insurance Company, Ltd.,
Petitioner,

against

UNITED FRUIT COMPANY,
Respondent.

BOSTON INSURANCE COMPANY,
Petitioner,

against

UNITED FRUIT COMPANY,
Respondent.

BRIEF FOR RESPONDENT.

These consolidated cases are here on Certiorari from the United States Circuit Court of Appeals for the Second Circuit. The decree of the Circuit Court of Appeals appears at page 115 of the record and modifies in part and affirms in part judgments of the Southern District of New York at common law (R. 84, 91, 97), and it directs the dismissal of the three complaints herein.

Opinions Below.

The opinion of Judge Patterson of the United States District Court for the Southern District of New York appears at page 77 of the record and is reported 18 F. Supp. 441; 1937 A. M. C. 78.

The opinion of the Circuit Court of Appeals (Judge L. Hand, writing, Judges Swan and A. N. Hand concurring) is printed at page 107 of the record and is reported 92 F. (2d) 576.

Certiorari was granted March 14, 1938 (R. 117). 302 U. S.

Proceedings Below.

These actions were consolidated in the District Court. (R. 27) The only distinction between the cases, other than the amount involved, is in respect of the subrogation receipts. This distinction will be referred to later in the Brief. The complaints (R. 6, 13, 20) present claims for additional subrogation by Hull underwriters against their assured, United Fruit Company, the owner of the *S.S. Almirante*, which was sunk through the fault of a government vessel, the *S.S. Hisko*, September 6, 1918.

The complaints set up two alternative claims: first, the underwriters sought the whole recovery from the United States, not only for the proportion of the value of the vessel insured by them, but for the large excess value of the vessel which was not insured by the petitioners;* second, the underwriters claimed the amount of the legal and other

* This claim has been abandoned in this Court.

expenses necessary to collect their share of the recovery, and in addition claimed interest at 6% on the amounts paid by them under their policies, although no interest was recovered from the United States.

The answers (R. 8, 15, 22) deny the claim of the petitioners and assert that the assured respondent, jointly with the petitioners, employed counsel and incurred expenses to prosecute the claim against the United States for the interest of the underwriters and owner, and that a recovery was made from the United States, which did not include any interest, and that the recovery was apportioned in accordance with the loss suffered by the underwriters and owner with a proportionate deduction for the costs and legal expenses, and that, therefore, the Insurance Companies have received all that they are entitled to by way of subrogation.

Practically all of the facts are stipulated.

Testimony of one witness for the petitioners was taken. (R. 31-38)

After the trial decision was reserved. Verdicts were directed for the petitioners on December 30, 1936. (R. 83)

The effect of the verdicts was to allow the petitioners' claim for recovery of the amounts deducted as petitioners' share of the legal and other expenses of the recovery. Recovery, however, was not permitted for interest on the amounts paid by the underwriters, because no interest was recovered from the United States. The decision also denied the underwriters' claim that they were entitled to the whole of the recovery, regardless of the limited amount which they insured. Both sides appealed. (R. 85, 88, 92, 95, 98, 101)

Facts.

On May 1, 1918, the United Fruit Company took out a number of Hull policies on the *S. S. Almirante* with American and British Hull underwriters. These policies totaled $582,002.25, on an agreed valuation of $632,610.00 (Ex. 9, pp. 46-50).[1]

The American Hull insurance was $284,673, and the English Hull insurance $297,329.25 (£61,305 @ $4.85, Ex. 9, pp. 46-50).

Of the American Hull insurance the petitioners insured the following amounts:

Aetna Insurance Company[2]	$18,978
Boston Insurance Company[3]	15,815
Union Marine Insurance Co.[4]	6,326

For this insurance the United Fruit Company, of course, paid a substantial premium. Underwriters have had the use of these premiums since 1918.

In addition, in order to cover disbursements and other miscellaneous losses which an owner always incurs in connection with a total loss of a ship, such as loss of freight and future earnings, disruption of business, etc., and which are not taken care of by a recovery of any part of the value of a ship, the United Fruit Company took out with

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[1] This exhibit is a bound Recovery Statement prepared by Insurance Adjusters. By stipulation it was not printed. Copies were filed with the record.

[2] *Plaintiffs' Exhibit 6* (R. 63-65).

[3] *Plaintiffs' Exhibit 7* (R. 66-68).

[4] *Plaintiffs' Exhibit 8* (R. 69-71).

English underwriters, "P.P.I."[1] policies amounting to $173,945.25.[2]

The policies had nothing to do with value of the Hull.

The Fruit Company also took out with English underwriters P.P.I. policies covering *"increased value hull and machinery"* in the amount of $141,614 (£29,240 @ $4.85) (Ex. 1, R. 43, 44, attached stipulation, *Plaintiffs' Exhibit 1*, R. 40).

The English P.P.I. policies were honor policies. The United Fruit Company could not have sued on them, nor could the underwriters, in event of payment, sue the Fruit Company for any part of its return.

When the recovery was made from the United States, the Fruit Company, at the specific request of English P.P.I underwriters, made a voluntary return to them of $85,999.64. This was an act of grace on the part of the Fruit Company. They were under no legal obligation whatsoever.

The precise situation, therefore, with respect to the Fruit Company's loss of the vessel and recovery from underwriters and the United States was as follows:

---

[1] These letters stand for Policy Proof of Interest.

[2]

"Disbursements and Excess Liabilities" (Exhibit 2 (R. 45, 46), attached Stipulation, *Plaintiffs' Exhibit 1*, R. 40)	£27,740
"Freight" (Exhibit 3 (R. 47, 48), attached Stipulation, *Plaintiffs' Exhibit 1*, R. 40)	£ 5,625
"Disbursements" (Exhibit 4 (R. 49, 50), attached Stipulation, *Plaintiffs' Exhibit 1*, R. 40)	£ 2,500
	£35,865
@ $4.85	$173,945.25

Value of Vessel September 6, 1918 (Ex. 9, p. 27)			$1,750,000.00
Paid by American Hull Underwriters		$284,673.00	
Paid by British Hull Underwriters £61,305 @ $4.75¾ (Supplemental Stipulation, par. 3. *Plaintiffs' Exhibit 5*, R. 61)		291,658.53	
Paid by English P.P.I. Underwriters, Increased Value Hull and Machinery, £29,240 @ 4.75¾ (Supplemental Stipulation, par. 3, R. 61; Exhibit 1, R. 43, 44, attached to original Stipulation).		139,109.30	
Recovered from United States for owners	$976,288.10		
Less Recovery for interests other than Hull	13,013.38	963,274.72	
Total received by Fruit Company for Hull			$1,678,715.55
Net Loss of Fruit Company on whole transaction			$ 71,284.45

The petitioners' statement of the respondent's financial position as a result of the loss of its vessel, the *Almirante*, is inaccurate and misleading. For instance, in their computation they state, pages 4 and 5 of the Brief:

> "* * * after collecting the judgment in the collision suit the respondent had in hand the following sums in respect of the loss of the *Almirante*."

"Carried by respondent as self-insurer $50,609.00."

It is obvious that this amount represents an uninsured loss of the respondent for which it has never been indemnified. It cannot constitute sums in hand. The petitioners

also rely on an inadvertent statement in the answers that certain insurance was insurance on hull, when it is perfectly clear from the policies which are all in evidence, (see footnote 2, page 5) that this was insurance on risks other than hull.

In addition respondent is out of pocket large sums paid as premiums. Respondent has suffered substantial financial loss from this disaster and the petitioners, its underwriters, are seeking to increase that loss and to indemnify themselves in priority to their assured.

On September 6, 1918, during the currency of the Hull policies, the *Almirante* collided with the tanker *S.S. Hisko,* owned by the United States of America, and was a total loss. Following this loss the Hull underwriters paid the United Fruit Company, as they were bound by their policies to do, the sum of $576,331.53.

Upon payment of the loss, both the petitioner Boston Insurance Company and the petitioner Union Marine & General Insurance Company took subrogation receipts from the Fruit Company. The subrogation receipt of the Boston Insurance Company is Plaintiffs' Exhibit 3 (R. 56). Said receipt reads in part as follows:

> "We do hereby sell, assign and transfer to said Boston Insurance Company all our rights and interest in the above to the extent of $15815.00 to have and to hold the same to the said Company its successors and assigns to their own use forever."

The subrogation receipt of the Union Marine Insurance Company appears as Plaintiffs' Exhibit 6 (R. 62). Said receipt reads in part as follows:

> "In consideration * * * we hereby assign to you all of our rights and claims to any sum or sums of money to the extent of but not exceeding $6326.— * * * We further undertake if called upon by you so to do ourselves to undertake any such action or proceedings as you may direct on your behalf, it being understood that you are to indemnify us against any costs, charges or expenses to be incurred in respect of any proceedings to the extent of but not exceeding $6326—taken by virtue of this agreement."

A large number of the American underwriters took these subrogation receipts. A substantial number, in addition, specifically agreed with the Fruit Company to indemnify the Fruit Company for their share of the legal expenses if action were taken.

At the time of the collision, as the Court subsequently found, the *Almirante* was worth $1,750,000.00. (Exhibit 9, p. 27) Her coal, supplies and other equipment not included in the value of the vessel, were worth $12,193.02. The balance of the recovery from the United States, $820.36, represented expenses occasioned by the collision. (*Exhibit 9*, p. 27)

Thereafter in accordance with the subrogation receipts all of the Hull underwriters, both British and American, including the petitioners, and the respondent *jointly* retained attorneys to prosecute the claim for damages occasioned by the loss of the *S.S. Almirante* against the United States of America as owner of the *S.S. Hisko*. (R. 41)

Thereafter the attorneys retained jointly by the Hull underwriters, including the petitioners, and the respondent, pursuant to their retainer and pursuant to the instructions of the respondent and the Hull underwriters, including the

petitioners, petitioned for the passage of a Special Act of Congress authorizing suit against the United States of America (R. 41).

Notwithstanding the efforts of the attorneys acting jointly for the Hull underwriters and the respondent, the Special Act of Congress, which was passed, expressly provided that no interest was to be allowed on any recovery from the United States.[1] (R. 41)

After the passage of the Special Act of Congress and pursuant to their retainer jointly by the Hull underwriters, including the petitioners, and the respondent, and pursuant to their express instructions, the said attorneys filed suit in the name of the United Fruit Company in the United States District Court for the Southern District of New York against the United States of America as owner of the *S.S. Hisko*, and recovered the sum of $1,761,693.02 as the actual value of the *S.S. Almirante* and her equipment at the time of her loss.[2] (R. 41)

Of the sum recovered, $1,750,000 represented the actual value of the vessel, and the balance, to-wit: $13,013.38, represented coal, equipment, other supplies, and expenses.

The payment of this judgment was received by the attorneys acting jointly for the Hull underwriters, includ-

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[1] This was the general Governmental policy, of which this Court takes judicial notice.

"We are satisfied by the argument for the Government that the policy thus expressed in the Act of 1925 [a Special Act not bearing interest] had been the policy of the United States for years before 1922, and that the many private acts like the present generally have been understood, before and since the act now in question, not to carry interest by the often repeated words now before us." *Boston Sand Co.* v. *United States*, 278 U. S. 41, 47.

[2] The opinions of the Circuit Court of Appeals are reported at 34 F. (2d) 123 (on the merits), and at 54 F. (2d) 540 (on damages). The District Court opinions are reported at 1931 A. M. C. 347, and 1928 A. M. C. 1730.

ing the petitioners, and the United Fruit Company, on July 26, 1932. (R. 41)

In accordance with the provisions of the Special Act of Congress, under which the suit had to be brought, no interest was allowed on the recovery and no interest was in fact recovered.

The reasonable necessary legal and other expenses incurred by the petitioners and respondent in respect of said litigation, after deduction of taxable costs recovered, amounted to $300,024.33. (R. 41)

The precise sums received by the three petitioners and the method of arriving at the sums so paid are shown in the stipulations, par. 16. (R. 42)

In accordance with the usual custom, Messrs. Johnson & Higgins were employed to prepare a Recovery Statement. This Recovery Statement is in evidence as Exhibit 9 and by stipulation, par. 17, Plaintiffs' Exhibit 1 (R. 42), is *prima facie* evidence of facts stated therein. The Recovery Statement is not printed in the Record, but copies have been filed with the record.

It will be seen from the Recovery Statement that all Hull underwriters, both American and English, were treated precisely alike. The attorneys who had been jointly retained to carry on the litigation were requested to apportion their fee and other expenses between the Hull underwriters and the United Fruit Company. The attorneys apportioned these expenses one-fifth among all the Hull underwriters, English and American, and four-fifths to the United Fruit Company. *Plaintiffs' Exhibit 9*, p. 38.

Accordingly, each Hull underwriter received the amount that it paid under its policy in 1918, plus a small amount of bank interest earned on the money while it was in the hands

of attorneys for both parties after the judgment had been collected, but before it was distributed, less each underwriter's proportionate share of the cost of the services and disbursements of their own lawyers.

Thus, each Hull underwriter, including the petitioners, received exactly the amount it paid in 1918, less the exact amount paid to its own attorneys for collecting it from the United States.

Neither the Hull underwriters nor the United Fruit Company received any interest, because no interest was recovered and, consequently, there was no interest for the attorneys or the Fruit Company to account for.

All of the English Hull underwriters accepted the apportionment of the recovery on the basis above outlined (Grant, R. 36, 37). The case presents the anomaly of Mr. Grant's company prosecuting a claim in the United States as an American Hull underwriter and accepting the accounting in London as an English Hull underwriter. Grant's company was not interested as a P. P. I. underwriter.

After the award had been collected, the English P. P. I. underwriters, who had originally paid their honor policies, inquired of the Fruit Company whether, in view of the amount recovered, the owner would be willing to compensate them by making some equitable refund. While the owner was under no legal obligation to make any refund (*Edwards & Co.* v. *Motor Union Insurance Co.*, [1922] 2 K. B. 249), just as the P. P. I. underwriters had been under no legal obligation to pay the owner, the United Fruit Company appreciated the equities involved and voluntarily refunded to the P. P. I. hull underwriters the sum of $85,999.64. These P. P. I. underwriters had paid the Fruit Company in 1918 on a P. P. I. policy covering "Increased

Value, Hull and Machinery" the sum of $139,109 (*Supplemental Stipulation*, par. 3, R. 61).

Mr. Grant of the Thames & Mersey Company agreed that this action on the part of the owners was commendable. (R. 35)

The Policies of Insurance.

The policies of Hull insurance involved in this litigation were unusual.[1] The usual form of policy was almost completely supplanted by a special printed rider.[2]

Each rider contained a special valuation clause on the *Almirante* of $632,610.00.

> "This insurance to attach and cover upon the steamers named and for the amount designated upon each in the following schedule, and for so much as concerns the assured, by agreement between the assured and assurers in this policy each of said steamers shall be valued as shown below:"

It is on these words alone that Petitioners base their entire case.

The standard form of policy to which the special rider was attached had contained the customary warranty that the amount insured for account of the assured and/or their managers on Disbursements, Commissions, or similar interest "P. P. I.", should not exceed 15% of the insured valuation, with certain exceptions. *This warranty was supplanted by the following clause* in the rider:

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[1] Aetna Pl. Ex. 6, R. 63-65; Boston, Pl. Ex. 7, R. 66, 68; Union Marine, Pl. Ex. 8, R. 69, 71.

[2] The riders in each case are identical except as to names, dates and amounts.

"It is agreed that the owners and/or managers are at liberty to insure Disbursements and/or other interests to any amount at their own absolute discretion: and the Underwriters hereby waive disclosure of the amounts so insured."

By the express terms of the policy the Fruit Company was given the right to take out as much additional insurance as it chose, and was not limited to the standard of 15% above the amount stated in the valuation clause. Thus the Fruit Company, by terms of the special rider to the policy, had contracted for the right to take out additional insurance *to any amount,* or, of course, to assume such additional amount itself. The terms of the policy clearly show that the Fruit Company was to be a co-insurer above the amount named in the policy. In fact, the Fruit Company expressly reserved the right to take out such further insurance.

In this case the Fruit Company elected to assume, itself, the risk of loss of the value of the ship above $715,440.83, the amount insured under the Hull policies and the English P. P. I. policy on "Increased Value, Hull and Machinery."

Moreover the Fruit Company not only contracted expressly for the right to take out additional insurance and to act as a co-insurer, but stipulated that it should recover for partial losses up to the amounts of the policies irrespective of the value of the vessel. A special clause was inserted in the rider to the policy, reading as follows:

"This insurance is fully to indemnify the assured for any and all charges and expenses applicable to the vessel in respect of the perils insured hereunder, *irrespective of the value of the vessel,* and this policy shall pay its share of such charges and expenses in

the proportion which the amount hereby insured bears to the value as declared herein." (Italics ours.)

Thus, it is clear that by the terms of the policy rider, the Fruit Company and the Hull underwriters were co-insurers in respect to total losses. With respect to partial losses, the underwriters, notwithstanding they were co-insurers as regards total losses, had contracted specifically to pay full indemnity up to the amounts insured.

The partial loss provision is quoted above.

In this case if there had been a partial loss the underwriters in view of their contract would have had to pay 100% of such partial loss up to the amount insured, irrespective of the value of the vessel, and would have been entitled to 100% of the recovery of the amounts paid.*

In the case of total loss as here, the rule is entirely different. The underwriters pay merely the total amount of the policy and the owner loses the value of his vessel over and above the amounts paid by the underwriters. In this case the underwriters would have paid approximately 33⅓% of the actual loss and the Fruit Company would have assumed approximately 66⅔% of the loss. In case of total loss, therefore, the recovery is divided in the same proportion as the loss.

In the case of such total loss the underwriters are subrogated to any recovery to the extent of the amount paid

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* Partial losses to vessels are usually determined by the cost of repairs. The actual or agreed value of the vessel does not affect the matter at all. See page 47.

under their policies, and the owner is entitled to the balance. *The Livingstone,* (C. C. A. 2) 130 Fed. 746.

As shown by *The Livingstone* case, the agreed valuation clause has nothing to do with subrogation in a case of total loss.

The Decision of the District Court.

Judge Patterson in the District Court held, (R. 100) 18 F. Supp. 441:

> 1. Underwriters were subrogated to the claim of the owner against the United States to the extent of the amounts actually paid by each underwriter.
>
> 2. Underwriters were not subrogated to the entire claim of the owner against the United States.
>
> 3. Underwriters were not entitled to interest from the assured on the amounts paid by them because none was recovered from the United States.
>
> 4. Underwriters were not required to bear a proportionate share of the cost of making recovery against the United States.

He found authority for these holdings in a landmark decision, *The Livingstone,* 130 Fed. 746, reversing 122 Fed. 278.

His ruling on the first three points is clearly supported by the principle and facts of that case. His ruling that the underwriters do not have to bear a portion of the expenses was based on a sentence in the opinion dealing with costs, which did not involve any ruling or decision applicable to the facts here presented. This error was corrected by the Circuit Court of Appeals.

The Holding of the Circuit Court of Appeals.

The Circuit Court of Appeals (Judge Learned Hand writing. R. 107) held that the distribution of recovery between the owner and underwriters had been made in accordance with the established rules of subrogation as well as with co-insurance principles in total loss cases. That under such rules, the underwriters were obligated to pay their share of legal expenses for their own lawyers and were not entitled to recover interest for the reason that no interest was recovered from the United States. The Court held that the decision of *The Livingstone* was complete authority and that the Court in that case expressly approved the rules applied in this case, and that the statement in the opinion of that Court concerning payment of costs did not involve any ruling on the question of subrogation.

The Court further held that the decisions in this country, including a number of decisions of this Court, hold that the subrogation rights are not affected by the agreed valuation clauses. The Court clearly pointed out the errors of the dictum of *North of England Association* v. *Armstrong,* L. R. 5 Q. B. 244. The Court also pointed out that the reasoning of that dictum had been followed in a number of *partial loss* cases in lower courts. *The St. Johns,* 101 Fed. 469.

The Court held that such partial loss cases were not applicable to this case, and that in so far as the reasoning of *The Armstrong* case with respect to estoppel was adopted, they were probably wrong.

The Court also pointed out that the citation of *The Armstrong* case in *The Potomac,* 105 U. S. 630, 635, was merely an illustrative citation and not one of approval.

FIRST POINT.

THE RECOVERY FROM THE WRONGDOER WAS DISTRIBUTED ON PRINCIPLES OF SUBROGATION IN ACCORDANCE WITH EQUITY AND JUSTICE.

The situation disclosed by the undisputed facts is that when the owners lost their vessel in 1918 she was worth $1,750,000.00.

Pursuant to certain Hull insurance policies for which they had paid a large premium, the owners received from the Hull underwriters, including P. P. I. increased value, the sum of $715,440.83. The owners were, therefore, out of pocket, in respect to the value of the vessel, the sum of $1,034,559.17. Neither in respect to that part of the recovery from the wrongdoer, the United States, represented by the payment by underwriters, nor to the Fruit Company's share of the recovery for Hull, was any interest paid or recovered. If the Hull underwriters, who had been paid a premium for assuming a risk, can be said in any strict sense to have been deprived of the use of the money that they paid under their policies from the time of payment to the date of the distribution of the award, July 26, 1932, it is equally true that the Fruit Company has similarly been without any compensation for the use of its money during that same period.

The difference is that the underwriters were paid by the Fruit Company for assuming the risk of being out the very money they are complaining about, whereas no one has paid the Fruit Company for taking such a risk.

Underwriters still have the owners' premiums in their pockets and have enjoyed their use since 1918. As the Court said in *The Livingstone,* 130 Fed. 746, 749: "The premium is supposed to be a full consideration for the risk."

If any interest, compensation or profit is to be allowed to the Hull underwriters, it must come out of the Fruit Company, because no interest was recovered from the wrongdoer.

In looking at the equities of the situation, however, it must be borne in mind that, in respect to the Hull underwriters' complaint of not having the use of certain money, the Fruit Company had paid to the Hull underwriters a premium for assuming the risk, not only of being out the use of the money for a limited period of time, *but of being out the use of the money for all time.* It is neither just nor equitable that the Hull underwriters should receive interest from the Fruit Company which the Fruit Company did not receive from the wrongdoer, in connection with a risk which the Fruit Company paid the Hull underwriters to assume.

Equity requires that the Fruit Company should first receive indemnity.

It is clear that whatever rights the Hull underwriters have arise by way of subrogation. This is why most of the underwriters demanded and received "subrogation" receipts which divided up the claim.

A. *The cardinal rule of insurance is that the assured is to be indemnified first and that the only purpose of subrogation is to prevent the assured getting more than indemnity.*

In *Chapman* v. *Hoage,* 296 U. S. 526, at 531, the Court said:

> "* * * The insurer is given a right of subrogation not to enable him to avoid his undertaking to indemnify but that it may not be enlarged beyond that of indemnity. *Standard Marine Insurance Co.* v. *Scottish Metropolitan Assurance Co., Ltd.*, 283 U. S. 284, 288."

In *Standard Marine Ins. Co.* v. *Assur. Co.*, 283 U. S. 284, 288, the Court said:

> "* * * The object of subrogation is to make indemnity to the insured, up to the amount of the policy, the measure of the liability of the insurer, and that is its justification. But the liability would be less than such indemnity if the insurer could be subrogated to a right of recovery by the insured for a loss other than that insured against."

In *Aetna Casualty Co.* v. *Phoenix Co.*, 285 U. S. 209, 214, the Court said:

> "* * * That privilege [subrogation] was a necessary incident to petitioner's contract, for only by resort to it could the character of the contract as indemnity be preserved. It is both the object and the justification of subrogation that it makes exact indemnity the measure of the liability. See *Standard Marine Insurance Co., Ltd.* v. *Scottish Metropolitan Assurance Co., Ltd.*, 283 U. S. 284; *United States* v. *American Tobacco Co.*, 166 U. S. 468; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Commercial Union Ins. Co.*, 139 U. S. 223, 235; *Hall & Long* v. *The Railroad Companies*, 13 Wall. 367; *Jones* v. *Bacon*, 145 N. Y. 446, 450; 40 N. E. 216."

A similar effort by underwriters to avoid their obligations to indemnify their assured in disregard of the true

purpose of subrogation was recently defeated by this Court. in *The Dixon-King (Great Lakes Transit Corp.* v. *Interstate Steamship Co.)* 301 U. S. 646. In that case the Court said:

> "* * * the equity of subrogation invests the underwriters with the rights of the assured against third persons * * * not with a right to override its own obligation to the assured. * * *"

It is clear from the cases cited above and from *The Livingstone,* 130 Fed. 746, that the sole purpose of subrogation is to distribute a recovery between the assured and their underwriters in such a way that the assured will not receive more than indemnity. Clearly in this case the assured has not received full indemnity.

Petitioners contend for the exact opposite of this rule. They claim that the purpose of subrogation is to distribute a recovery in such a way that the underwriters will first receive full indemnity, with interest at 6%; the interest or profit at the expense of the shipowner to whom they issued a policy of indemnity for a large premium, and who has not yet received full indemnity for his loss from all sources.

In *The Livingstone,* 130 Fed. 746, the Court pointed out at page 747 the inequity of permitting an underwriter to make an enormous profit at the expense of his assured.

Whether you call the interest demanded here by the Hull underwriters an "enormous profit" or "compensation for the use of the money", the fact remains that it is a compensation which would have to come out of the United Fruit Company. By so much more will it fail to have been indemnified for the loss of its ship.

We cannot help wondering whether underwriters would claim that they are entitled to 6% interest in every case of this character.

Under the Act, under which this suit was brought, no interest was recoverable from the United States. Today, under the Admiralty Suits Act,* if the United States is held as a wrongdoer, the owners can recover the amount of their loss, *plus 4% interest.* If the Hull underwriters are correct in their contentions, they would in such a case today be subrogated not merely to the amount of interest recovered from the Government, namely, 4%, but would be entitled, in addition, to an extra 2% out of the owner's pocket to make up a rate of 6% as claimed here.

Whatever the interest demanded in this case is called, it is clear that it represents substantial compensation for the use of the money. There is no proof in the Record that the underwriters could have earned any interest or profit if they had had the use of the money.

Interest is ordinarily payable as a result of an express or implied contract to pay money at a specified time, or for a wrongful withholding or non-payment of an obligation to pay money when due.

The Fruit Company had no contract to pay money to the underwriters. In fact, the contract was that the underwriters would pay the Fruit Company a certain sum of money in a certain eventuality, which happened, to-wit: the loss of the ship. There was no promise on the part of the Fruit Company to return the money with or without interest. The wrongdoer, the United States, paid no interest.

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* 46 U. S. C., s. 743.

Certainly, neither the Fruit Company nor the attorneys for both parties were under any obligation to account to the Hull underwriters until the money was received from the wrongdoer on July 26, 1932. The relationship here was really that of a trustee. The general rule is that a trustee is not liable for interest unless interest is collected.

The District Judge said (R. 82):

> "Here the defendant took nothing by way of interest. It got no redress as to that element of its loss. As to interest it held nothing as trustee for the plaintiffs, and their right of subrogation gives them nothing. See *Standard Marine Ins. Co.* v. *Scottish Metropolitan Assn. Co.*, 283 U. S. 284, 288."

B. *The recovery was distributed to underwriters and assured in exact conformity with the equitable doctrine of subrogation.*

In Marine Insurance owners and underwriters are regarded as co-insurers. *The Potomac,* 105 U. S. 630, 634-635; *Norwich Union Fire Ins. Soc.* v. *S. O. Co.* (C. C. A. 8), 59 Fed. 984; *The Commonwealth,* [1907] P. 216, 223. By reason of the co-insurance principle in admiralty, decisions often describe subrogation as an assignment to the underwriter, as of the time of payment of loss, of an interest in the cause of action against the wrongdoer proportionate to the amount of the loss paid by the underwriter. If the underwriter pays 100% of the loss, he owns the entire cause of action; if he pays 50% of the loss, he owns half the cause of action and the assured owns the other half.

The subrogation receipts in this case were carefully worded in accordance with this principle, and, as the Court below pointed out, this simple logical principle of equity has been scrupulously observed.

This is readily demonstrated. Boston Insurance Company, for instance, paid under its policy $15,815. Its subrogation receipt contained an assignment of the cause of action *"to the extent of $15,815"*. (R. 24)

Thereafter Boston Insurance Company, together with the other owners of the cause of action (the remaining underwriters and the assured), employed counsel to prosecute. Boston Insurance Company's counsel recovered for it $15,815, *without interest*. Counsel then deducted their fee and paid Boston the balance of the recovery.

These are the stipulated facts of this case. The adjustment made by Johnson and Higgins, described by the Court below as "well known marine insurance agents", was made on these elementary principles. As Judge Hand said "* * * we do know that it [the distribution statement] was prepared by persons especially versed in such questions, and they at any rate followed the orthodox rule". *St. Louis Iron Mountain and Southern Ry. Co.* v. *Commercial Ins. Co.*, 139 U. S. 223, 235; *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 462; *The Potomac*, 105 U. S. 630, 634; *Norwich Union Fire Ins. Soc.* v. *S. O. Co.* (C. C. A. 8), 59 Fed. 984, 987.

The reason that the underwriters did not receive interest was that their attorneys could not recover interest from the United States. The assignment to underwriters of a portion of the cause of action gave them only the assured's rights as to the part assigned; they acquired no other right either against the assured or the wrongdoer. *Standard Marine Ins. Co.* v. *Assur. Co.*, 283 U. S. 284; *Luckenbach* v. *McCahan Sugar Co.*, 248 U. S. 139, 146; *Mobile & Montgomery R. Co.* v. *Jurey*, 111 U. S. 584, 594; *Boag* v. *Standard Marine Ins. Co.*, (C. A.) 57 Ll. L. 83.

The reason underwriters had to pay their proportionate share of legal expenses was that they retained the lawyers and promised to pay them and, in fact, did pay them voluntarily. In the Union Marine receipt there was an actual written agreement to pay the legal expenses. (R. 17) No good reason has been suggested why such an agreement is not binding. The Fruit Company performed its part.

The distribution of the recovery in this case has been made in punctilious conformance with every principle of equity as applied in trusts, agency and insurance. *Federal Ins. Co.* v. *Det. F. & M. Ins. Co.*, (C. C. A. 6) 202 Fed. 648, 654; *Sun Insurance Office* v. *Hohenstein*, 128 Misc. 870; *The Commonwealth*, [1907] P. 216; *Assicurazioni* v. *Empress Assur. Corp.*, [1907] 2 K. B. 814, 821; *The Welsh Girl*, [1906] 22 T. L. R. 475; *Duus Brown & Co.* v. *Binning*, [1906] 11 Com. Cas. 190, 194.

SECOND POINT.

THE EQUITABLE PRINCIPLES OF SUBROGATION ARE NOT CHANGED BY THE AGREED VALUATION IN THE POLICIES.

Petitioners attempt to gloss the true character of their claim with the adjective "conventional". The convention being that, under the policies, if a total loss occurred it was agreed that it would not be necessary for the assured to produce evidence as to the *Almirante's* value; as a simple means of fixing the loss it was agreed for mutual convenience that her value was $632,610.

The "convention" was only the familiar stipulation for liquidated damages. The agreed valuation in this case was a conditional contract that lapsed because the condition

never occurred. It had no effect on the amount paid by the underwriters. No case in the history of American or British Maritime Law supports petitioners' "conventional" claim. The only previous assertion of petitioners' claim that "the agreed value is binding for all purposes" was condemned by the Second Circuit in *The Livingstone*, 130 Fed. 746, which has stood for years.

A. *The agreed valuation had no effect on the amount paid by underwriters.*

To illustrate the immateriality of the agreed valuation with respect to facts involved here, we will again use the Boston Insurance Company's position as being fairly illustrative.

Boston insured the *Almirante* for $15,815. Boston and assured agreed that in event of total loss, assured would not have to bring in experts' opinions or other proofs as to her value. She was a total loss, so Boston paid the full amount of its cover. The real value of the *Almirante* was $1,750,000. The agreed valuation, $632,610, therefore, had no effect on the amount paid by Boston; on the basis of the agreed valuation it paid $\frac{15,815}{632,610}$ of $632,610; without the valuation it paid $\frac{15,815}{1,750,000}$ of $1,750,000.

Petitioners' claim, therefore, has no basis in fact; not a single circumstance affords any support for petitioners' attempt to avoid simple principles of justice and equity. Petitioners may well claim that they assert merely "conventional" rights.

B. *An agreed valuation does not affect the equitable principles of subrogation.*

Subrogation is a device of equity which is employed by the court after an underwriter has paid a loss on a policy

and after the assured has made a recovery from the wrongdoer, and it is only employed to prevent the assured from getting more than indemnity. See decisions of this Court cited *supra,* pp. 18, 19.

Agreed valuation is a device employed by underwriters and policy holders for their mutual convenience to facilitate adjustment of total losses—a stipulation for liquidated damages when the ship is destroyed.

The Circuit Court of Appeals in *The Livingstone,* 130 Fed. 746, 748-9 said:

> "The valuation clause was originally adopted in marine policies to avoid the difficulty and sometimes the impossibility of ascertaining with precision the value of the property insured. As this was the first step in the accurate measurement of the loss the insurer and insured agreed upon a value which, as between them, was to be taken as the basis of subsequent calculations. Why the agreement of the parties upon a convenient basis of calculation should operate to change the principle upon which the insurer had, theretofore, been reimbursed to the extent of his payment under the policy, it is not easy to understand. The reason of the rule is plain. A contract of insurance is one of indemnity. The premium is supposed to be a full consideration for the risk. Nevertheless, where the insurer has paid the entire amount of the loss he becomes subrogated, to the extent of his payment, to whatever interest the insured has in the property and to the latter's right to proceed against one who has negligently caused the loss."

This language was approved and followed in *Mutual Fire Insurance Co.* v. *Budd,* 208 Mich. 483, and was carefully considered and re-affirmed by Judge L. Hand in this case.

The same principle is stated in *Eldridge on Marine Policies,* 2d Ed. p. 90:

> "The valuation in the policy is, in the absence of fraud, binding upon the parties for the purpose of ascertaining the amount to be paid by the underwriter in the case of either total or partial loss (*Irving* v. *Manning,* 6 C. B. 420); and the valuation has no other effect, notwithstanding the language which Lord Campbell is reported to have used in the above case, where he says that the valuation is 'for *all* purposes,' and a like statement by Mellor, J., that '*all* questions as to the mutual rights of the assurer and the assured must be governed by the value stated in the policy' (*North of England Iron S.S. Assoc.* v. *Armstrong,* L. R. 5 Q. B. 244).
>
> "Hence the valuation in the policy is not apart from contract the value of the ship for the purpose of determining whether the ship is a constructive total loss, since for *that* purpose the repaired value must be considered (*Irving* v. *Manning,* 6 C. B. 391). Nor is the valuation binding upon any one except the parties to the policy and their assignees (*Bousfield* v. *Barnes,* 4 Camp. 228), but as between these parties the valuation will be binding in the absence of fraud or such excessive valuation as amounts to fraud."

A Note Editor at 29 Harvard Law Review 553, 554 reached the same conclusion:

> "* * * It is submitted that a 'valued' policy of the type in the principal case should effect no change in this result: in such a policy the whole vessel is insured, the clause stating the agreed value being inserted only in order to save the expense and doubt that may attend a later investigation of value in case of loss. In this respect it resembles an agreement

> for liquidated damages, and is to be sharply distinguished from insurance of a certain amount taken on a vessel. * * * Since in subrogation we must first see the insured made whole, and since actual value has been made the basis of recovery from the tortfeasor, that value and not the agreed value should be the basis of distributing the fund recovered. For this neither violates the contract nor protects the insured in any wrong. * * *"

See also *Pleasants* v. *Maryland Ins. Co.*, 8 Cranch 55; *Columbia T. Co.* v. *Norske Lloyd Ins. Co. Ltd.*, 100 Misc. 550, affirmed 229 N. Y. 556.

THIRD POINT.

THE DECISIONS RELIED ON BY PETITIONERS HAVE BEEN EXPRESSLY REPUDIATED IN THIS COUNTRY, CRITICIZED IN ENGLAND, AND ARE BASED ON PRINCIPLES RECENTLY DISAPPROVED BY THIS COURT.

Petitioners' original position was that the "agreed valuation" was binding for all purposes, and that they were entitled to the entire recovery from the United States.

The claim for the entire recovery has now been abandoned. (Petitioner's Brief, p. 8) This is, of course, a concession that the "agreed valuation" is not binding for all purposes.

Petitioners' contention, or so much of it as now remains, is based on a dictum in *North of England Association* v. *Armstrong*, L. R. 5 Q. B. 244.

The case of *North of England Association* v. *Armstrong, supra,* arose at a time when the valuation clause was new

and the judges in England had not become familiar with its real purpose. The decision has been criticized in later decisions. *Burnand* v. *Rodocanachi,* [1882] L. R. 7 App. Cas. 333, 342; *Goole & Hull Steam Towing Co.* v. *Ocean Marine Ins. Co.,* [1928] 1 K. B. 589, 597; Halsbury's, *Laws of England,* s. 973, vol. 17; and see *S. S. Balmoral Co. Ltd.* v. *Marten,* [1902] App. Cas. 511, 514; *Pitman* v. *Universal Marine Ins. Co.,* [1882] L. R. 9 Q. B. D. 192; *Irving* v. *Manning,* 6 C. B. 391, 136 E. R. 1302.

The Armstrong decision is based entirely on the notion that the application of agreed valuation depends upon estoppel. This Court in *Gulf Refining Co.* v. *Ins. Co.,* 279 U. S. 708, 712, has said:

> "The application of the agreed value to the adjustment of the insurance loss does not depend on estoppel * * *."

The dictum of the *North of England Association* v. *Armstrong,* L. R. 5 Q. B. 244, which would give underwriters the whole recovery where the insurance was for less than the value of the vessel, was expressly repudiated in *The Livingstone,* 130 Fed. 746, where the Court said, pages 749, 750:

> "* * * That decision carries no greater weight in this country than is compelled by the force of its reasoning, and, after careful consideration, we are unconvinced by its logic and are unable to accept its conclusions. It proceeds upon what, to our minds, is an unnecessarily harsh and inequitable exposition of the rights of the insured, based upon the assumed change in the law produced by what the Chief Justice considered a 'new-fangled form of insurance.' * * *"

The English court considered the agreed valuation a "new-fangled form of insurance".

The Court below accurately appraised the decision in the following language (R. 166, 167):

> "As to authorities, North of England Association *v.* Armstrong, L. R. 5 Q. B. 244, (1870), supports the plaintiffs; supports them even in their claim to the whole recovery, though that point was not actually decided. It held flatly that the agreed value was an estoppel between the parties whenever value became relevant in their legal relations. That result was thought to follow upon the privilege of an underwriter, who has paid a total loss, to take over the wreck, to raise and repair it, and to make such profit from it as he can. Recovery against a tort-feasor stands precisely like the wreck, the court said; it is a substitute for the ship and the underwriter is as much entitled to it. This argument seems to us fallacious. In the first place, the owner often in fact abandons the wreck, though the underwriters' privilege does not in law depend upon it; and so far as we are advised, no case has arisen in which an underwriter has actually profited out of the wreck, when the owner did not abandon. But assuming that in such a case he might retain any profit, that is irrelevant here. An owner who receives payment of a total loss and who, even though he does not expressly abandon the wreck, allows the underwriter at his own cost to raise and restore it, may well have no equitable claim to any resulting profit. But an owner who, not being covered by his hull insurance, actively prosecutes a right of action against a tort-feasor—especially when, as here, he does it in conjunction with his underwriter—shows as plainly as possible that he means to assert an interest in it, which would be grossly unjust to give to the underwriter after the

owner has won. Yet, unless one is prepared to go so far as this, the reasoning of North of England Association *v.* Armstrong, *supra,* (L. R. 5 Q. B. 244), will not serve, for there is no antecedent ground for saying that the agreed value must be an estoppel for all purposes. Lord Blackburn in Burnand *v.* Rodocanachi, L. R. 7 App. Cas. 333, 342, plainly disapproved the decision, and although Scrutton, J. felt bound to follow it in Thames & Mersey Marine Ins. Co. *v.* British & Chilean S. S. Co., (1915) L. R. 2 K. B. 214, he too appears to have had doubts as to its correctness (p. 221)."

The Armstrong Decision Is Based on Theories Condemned by This and Other American Courts.

Estoppel theory. As the Court below pointed out, the real basis of *The Armstrong* case is that by reason of the agreement fixing the value of the vessel for purpose of computing the insurance liability in total loss cases, the parties are estopped from ever showing the real value of the vessel under any circumstances. Even underwriters have finally abandoned that position.

We have shown that in the present case there could not be estoppel in fact, because the agreed valuation had no effect. The underwriter paid no more than he would if there had been no agreed valuation. The basic element of estoppel—reliance on a representation resulting in a change of position—is, therefore, missing.

But this Court has correctly established that the agreed valuation does not operate by estoppel. "The application of the agreed value to the adjustment of the insurance loss does not depend on estoppel * * *." *Gulf Refining Co.* v. *Ins. Co.,* 279 U. S. 708, 712.

That decision was followed by the Court below.

The Armstrong decision was based on an error of first impression by a court baffled by a new clause, "a new-fangled form of insurance". The rule of this Court was a mature judgment approving the reasoning of many inferior courts.

Gulf Refining Co. v. *Ins. Co.,* (C. C. A. 2) 27 F. (2d) 678, 679;
British & Foreign Marine Ins. Co. v. *Maldonado & Co.,* (C. C. A. 9) 182 Fed. 744, cert. den. 220 U. S. 622;
The Livingstone, (C. C. A. 2) 130 Fed. 746;
Irving v. *Manning,* 6 C. B. 391, 136 E. R. 1302;
Bradlie v. *The Maryland Insurance Co.* 12 Pet. 378, 399;
Patapsco Ins. Co. v. *Southgate,* 5 Pet. 604;
Mutual Fire Ins. Co. v. *Budd,* 208 Mich. 483;
Eldridge on Marine Policies, 2d. Ed. p. 90;

A corrollary of the rule of the *Gulf* case, above stated, is the now universal recognition of another rule of that case (p. 712):

> "The policy agreement valuing the cargo at a specified amount is not a representation, or so regarded. It is no more than a stipulation, in effect, that for purposes of computation of the insurance liability the cargo shall be taken at an agreed value. Within this limitation the policy is still a policy of indemnity * * *."

See cases cited *supra.*

> "Indeed valued insurance is only an instance of stipulated damages. *Empire Dev. Co.* v. *Title G. & T. Co.,* 225 N. Y. 53, 58."

St. Paul Fire & Marine Insurance Co. v. *Pure Oil Co.*, (C. C. A. 2) 63 F. (2d) 771.

ABANDONMENT THEORY. Sometimes after a marine disaster it is difficult to determine whether or not the loss is total. The ship may be salved or not. In such a case the owner may elect to collect his insurance as a total loss and let the underwriter worry about the hull. In such a case he may abandon to the underwriters who thereupon are vested with title to the hull. The abandonment is a contract in the nature of an accord and satisfaction; it involves a voluntary actual assignment of title to the hull. If salvage is successful, the underwriter may profit.

Subrogation is enforced by equity and does not depend on any act by the assured.

In *The Armstrong* case, the court thought the situations analogous. The Court below admirably disclosed this error of *The Armstrong* case. See language quoted page 30, *supra*.

The error of *The Armstrong* case, in likening subrogation to abandonment, has been as clearly exposed by decisions and authors as has the entire dictum relied on by petitioners.

FOURTH POINT.

The Livingstone, THE ONLY MARINE CASE IN POINT, WAS FOLLOWED IN THIS CASE.

The Armstrong case was not a total loss case in which the recovery from the wrongdoer exceeded the agreed valuation. Petitioners only rely on a dictum of that case.

The only authority here or in England before this case was *The Livingstone,* (C. C. A. 2) 130 Fed. 746. There is no question involved here of bringing our law into line with English law.

The Livingstone was a collision case. The same hull underwriters insured the *Livingstone* and the *Grand Traverse.* The *Grand Traverse* was insured on a valuation of $25,000.00. The vessel was in fact worth $37,500.00.

Against the wishes and the active opposition of their underwriters, the owners of the *Grand Traverse* brought suit against the *Livingstone.* The *Livingstone* was defended by the hull underwriters of the *Grand Traverse* and their lawyers.

The *Livingstone* was held solely at fault, with the result that the owners of the *Grand Traverse* recovered a judgment of $37,500, *with interest at 6% from the date of the loss, which was October 18, 1896.**

The hull underwriters of the *Grand Traverse* did not pay the loss on that vessel until February 19, 1897.*

Thus, in *The Livingstone* case there was an actual recovery of interest at the rate of 6% from the wrongdoer

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* These dates are taken from the record, page 3.

for the full period during which underwriters had been out the use of their money. In fact, there was a recovery of interest from the wrongdoer for both the periods during which the owners of the *Grand Traverse* and their underwriters had, respectively, been out the use of the money. The court allowed underwriters the interest, which had been recovered from the wrongdoer, for the period during which underwriters were out the use of their money. In addition, owners received interest for the period prior to payment by underwriters and upon the excess value from the date of the loss.

The Livingstone decision represents the true principles of subrogation. There had been a recovery from the wrongdoer with interest at 6% for the full period during which underwriters were out the money, and being subrogated to the rights of the owners in respect to this interest, underwriters received the interest. As a matter of fact the underwriters being on both vessels paid the actual interest that they received back.

There was no question involved in The Livingstone case of a shipowner being compelled to hand over interest to an underwriter when in fact the owner had received no interest.

Similarly, the question of costs in *The Livingstone* case was wholly different from the question as presented in the present case. In fact, as appears from the opinion of the District Court in *The Livingstone*, 122 Fed. 278, the lawyers seem to have stipulated the matter of fees as between themselves, without reference to the court.

Nevertheless, it is clear that in that case the underwriters did not have to pay any legal expenses.

The decision of *The Livingstone,* in so far as costs were concerned, was based on peculiar facts in that case involving established principles of law not present in this case. In our briefs below we quoted from the various briefs of the parties to *The Livingtone* case, in which it appeared that the contentions of the parties, in so far as costs were concerned, were not based on principles of subrogation, but on other equitable doctrines.

The assured contended that, since he had conducted all of the litigation and had made a meritorious recovery which would benefit the underwriters, he should be given a reward for his diligence and efforts; the reward being that he should not have to pay any share of the legal expenses. He cited the case of *Newcombe* v. *Cin. Ins. Co.,* 22 Ohio St. 382. In that case the active litigant was given priority over the parties who did not join in the litigation and did not have to bear any share of the legal expenses. This is a well established principle. *Woodworth* v. *Ins. Co.,* 5 Wall. 87; *The Battler,* (E. D. P. A.) 67 Fed. 251, 253.

The underwriters on the other hand contended that the assured had not benefited them in any way by the litigation, because the recovery from the litigation came out of the underwriters' own pockets. They said it would be unjust and unreasonable for a person to have to pay for an action against himself. This is an established doctrine.

Hardman v. *Brett,* 37 Fed. 803;
Coleman v. *United States,* 152 U. S. 96;
Hobbs v. *McLean,* (1886) 117 U. S. 567.

It is our contention that the Circuit Court of Appeals in *The Livingstone,* in its discretion, decided the issue of

costs in favor of the underwriters because they did not benefit in any way from the litigation. In fact they lost by it. This is the simple logical explanation for the ruling of the court. As Judge L. Hand pointed out the entire opinion in *The Livingstone* is devoted to the demolition of the doctrine of *The Armstrong* case. The Court could not, therefore, have decided the issue of costs because of agreed valuation. It seems to us, therefore, that the ruling as to costs can be easily understood in the light of the contentions made by the parties with respect to the peculiar circumstances there involved.

The petitioners in their brief, at page 23, disregard entirely the principles on which *The Livingstone* was decided and rely only on the last sentence of *The Livingstone* opinion, which reads as follows:

> "The decree is reversed with costs of this appeal and the case is remanded to the District Court with instructions to enter a decree awarding the appellees interest on the sums paid by them during the time they were deprived of the use of said sums, and awarding the balance of the fund in court, after paying court fees and charges, to the libellants."

This sentence just quoted, however, was not an opinion that underwriters were entitled to interest which had not been received from the wrongdoer or to legal costs which they had expressly incurred for their own attorneys, because in *The Livingstone* case interest had actually been recovered from the wrongdoer, and the legal expenses had not been incurred either for the benefit of or at the request of the underwriters.

The sentence quoted dealt only with the form of the decree under the peculiar facts of *The Livingstone* case.

Neither in *The Livingstone* nor in any other case is there authority for the assertion that underwriters are entitled to interest on a loss which should have been paid by a wrongdoer when in fact the wrongdoer has paid no interest. Similarly, neither *The Livingstone* nor any other case can be cited as authority for the proposition that underwriters should not be responsible for the fees of lawyers that they themselves have retained, or for expenses incurred at underwriters' request and for their benefit.

In fact, *The Livingstone* decision, in respect to the payment of legal expenses because of the fact that the underwriters had insured both vessels involved in the collision, was really ruled by the case of *The Potomac,* 105 U. S. 630.

In *The Potomac* a collision took place between the *Robert E. Lee* and the *Potomac.* Under a policy of insurance the owner of the *Robert E. Lee* had insured her for two-thirds of her actual value by valued policies. The policies provided that in case the underwriters should pay a loss, the assured should assign to them all rights against third parties and that they should be entitled, upon recovery from the wrongdoer, to such proportion of the damage recovered as the amount insured bore to the valuation in the policies. The underwriters paid a partial loss under the policies and, after their assured, the owners of the *Robert E. Lee,* had filed a libel in the District Court against the *Potomac,* the underwriters executed and delivered to the owners of the *Potomac* an instrument in writing by which, after reciting the collision, the payment of the insurance money to the owners of the *Robert E. Lee,* and the fact that they had never authorized the bringing or prosecution of

the suit and desired no suit brought on their account, they released, discharged and set over to the owners and master of the *Potomac* "any and all right which they have in and to any damage and claim of damages, if any there be, whether legal or equitable, growing out of the said collision and authorized them to use the same by way of defense or otherwise in and to the said suit."

While it does not appear specifically from the opinion, it is obvious that the underwriters had insured both vessels and did not wish to sue themselves through a suit by the owners of one of the vessels that they had insured, against the other.

The Court held that the underwriters, by paying a portion of the loss on the *Robert E. Lee* under their policy, pursuant to the express agreement contained in that case, had acquired a proportionate share in a claim against the *Potomac* and, having acquired that right, were entitled to assign it to the owners of the *Potomac,* to be used in a set-off by the *Potomac* in the libel by the owners of the *Robert E. Lee.*

The situation in *The Livingstone* was almost precisely the same, except that in *The Livingstone* there was no formal assignment. If in *The Livingstone* case the underwriters on the *Grand Traverse,* after paying the amount of the valued policy, to wit: $25,000, to the owners of the *Grand Traverse,* had then assigned to the owners of the *Livingstone* the $25,000 interest that they had acquired in the cause of action against the *Livingstone,* then obviously the owners of the *Livingstone* could have set that up in the lawsuit and the recovery in *The Livingstone* by the owners of the *Grand Traverse* would merely have been for the excess over $25,000. In such a situation, of course, the under-

writers on the *Grand Traverse* would not be liable for any legal expenses in the suit brought by the owners of the *Grand Traverse* against the opposition of their underwriters. The underwriters in their capacity as insurers of the *Livingstone* would have been liable only for the amount of the *Grand Traverse's* claim above $25,000. So far as costs are concerned, this was the exact effect of the ruling with respect to costs in *The Livingstone* and is in accordance with the ruling of this Court in *The Potomac,* 105 U. S. 630.

The Potomac was a partial loss case and not a total loss case. The policy contained an express provision as to how any recoveries against third parties for partial losses should be apportioned. The effect of a valuation clause when the vessel was worth more than the agreed value was not involved.

The general rule in marine insurance, in the absence of an agreement to the contrary, is that the owners and underwriters are co-insurers both in respect to partial and total losses. See cases cited page 22, *supra.*

It is argued here that the agreed valuation clause takes this case out of the general rule. Such a contention, however, disregards two factors entirely.

FIRST. This was a total loss case, where the recovery exceeded the agreed valuation and the recovery from the wrongdoer was based on the real value and not on the agreed value.

SECOND. The terms of the policy clearly provided for the co-insurance principle in respect to total losses. With respect to partial losses the policies provided that partial losses should be paid up to the amount insured in the policies in disregard of the

co-insurance principle. If the agreed valuation clause took the case out of the co-insurance principle as regards partial losses, this clause was wholly unnecessary and meaningless.

As regards losses above the agreed valuation, the Fruit Company expressly contracted that it should have the right to take out as much additional insurance as it pleased, and there was a waiver in the policies as to the disclosure of the amounts.

Such insurance, if not placed on a wager basis, would share to the extent paid in any recovery against a wrongdoer on the same basis as the agreed value hull underwriters. *Brown* v. *Merchant's Ins. Co.* (C. C. A. 9) 152 Fed. 411.

That the underwriters, or at least a majority of them, understood that as respects losses in excess of the agreed valuation, the owners and/or other underwriters were co-insurers with the agreed value underwriters, is clear from the conduct of the parties after the loss. Not only did a majority of the underwriters demand and receive subrogation receipts or assignments of the claim against the wrongdoer, splitting up that claim between the interested parties, but underwriters jointly retained lawyers to seek recovery of their share of the claim. In the Union Marine case the underwriters expressly agreed in writing to pay their share of the legal expenses involved in the common adventure. The English underwriters accepted the Adjustment and carried out their agreement. American underwriters alone seek to repudiate their undertakings.

How the repudiated theory of Estoppel, first announced in *The Armstrong* case, and then followed in *The St. Johns,* in the District Court, 101 Fed. 469, could be appli-

cable under the facts of this case is not apparent. But, unless, as Judge Learned Hand pointed out in the Court below, the estoppel theory, which was disapproved by this Court in *Gulf Refining* v. *Ins. Co.*, 279 U. S. 708, is correct, then the situation is that the agreed value was only a convenient stipulation for damages and did not confer on underwriters either the right to get all of the property belonging to the Fruit Company or preference at the expense of the Fruit Company.

FIFTH POINT.

THE ERRONEOUS RULING OF *The Armstrong* RELIED ON BY THE PETITIONERS WAS CONDEMNED BY THIS COURT IN *Gulf Refining Co.* v. *Ins. Co.*, 279 U. S. 708. IN THAT DECISION THIS COURT REFLECTED ON THE SOUNDNESS OF CERTAIN DISTRICT COURT OPINIONS RELIED ON BY THE PETITIONERS.

The error of *The Armstrong* case, which has been so clearly pointed out in the decisions of this Court and the Circuit Court of Appeals for the Second Circuit, had a limited acceptance in early decisions. In fact, *The Armstrong* case was cited in dicta in two Supreme Court cases. *The Potomac,* 105 U. S. 630, 635; *Mobile & Montgomery R. Co.* v. *Jurey,* 111 U. S. 584, 594. The Circuit Court of Appeals for the Second Circuit, both in *The Livingstone* and this case, pointed out that the citation of *The Armstrong* decision was by way of dictum not importing any approval of the doctrine.

The case of *Mobile & Montgomery R. Co.* v. *Jurey,* 111 U. S. 584, on which petitioners apparently place great reliance, involved merely a question of who was the proper

party to sue a wrongdoer for a loss which had been compensated for by insurance. The so-called approval by this Court at page 594 of the dictum in *The Armstrong* case has not now the support of even the petitioners, because the petitioners concede that the dictum of *The Armstrong* case was erroneous and inequitable. The nature of the dictum in *The Potomac* has been discussed *supra,* page 40.

Except in peculiar cases of partial loss in hull insurance *The Armstrong* error has never been accepted. This Court refused to follow it in a cargo case in which the principle of *The Armstrong* case was directly asserted. *Gulf Refining Co.* v. *Ins. Co.,* 279 U. S. 708. As the Court below pointed out, the doctrine of *The Armstrong* case does not apply even in hull cases when the claim does not result from repairs, *Pitman* v. *Universal Ins. Co.,* [1882] L. R. 9 Q. B. D. 192; *S.S. Balmoral* v. *Marten,* [1902] App. Cas. 511; or as to the calculation of constructive total loss. *Bradlie* v. *The Maryland Insurance Co.,* 12 Pet. 378, 399; *Patapsco Ins. Co.* v. *Southgate,* 5 Pet. 604; *Irving* v. *Manning,* 6 C. B. 391, 136 E. R. 1302.

A decision holding that the agreed valuation does apply to subrogation is *The St. Johns,* (S. D. N. Y.) 101 Fed. 469. That was a partial loss case, which is distinguishable from a total loss case. That decision was grounded on the opinion of the Southern District of New York in *The St. Paul* (*International Navigation Co.* v. *Atlantic Mutual Ins. Co.*), 100 Fed. 304. It was concerning that case that this Court said:

> "We need not determine whether the rule as to hull insurance may be regarded as that of this Court or of others, or pass upon its merits."
>
> *Gulf Refining Co.* v. *Ins. Co.,* 279 U. S. 708, 713.

A. *The decision of The St. Paul is based solely on the reasoning of The Armstrong case and is entirely discredited.*

The St. Paul (*International Navigational Co.* v. *Atlantic Mutual Ins. Co.*), 100 Fed. 304, 317 affirmed without opinion (C. C. A. 2) 108 Fed. 987, cert. den. 181 U. S. 623, is hereinafter referred to as *The St. Paul.*

The St. Paul was valued in the policy at $1,350,000. Her actual value was $2,100,000. She was stranded on the New Jersey Coast near Long Branch with a resulting loss of $248,377.28.

The owner asked the underwriters to pay the entire loss. The underwriters pointed out that since the actual value of the vessel was largely in excess of the agreed valuation, the principle of co-insurance should apply, and that the owner and the underwriters should bear the partial loss in accordance with relative amounts at risk.

The court decided in favor of the owner and held that the underwriters had to pay the entire amount of the loss. The opinion is lengthy. The only substantial authority available to the Judge was *The Armstrong* opinion. A careful scrutiny of the reasoning of *The St. Paul* shows that no ground is advanced in support of the conclusion other than the grounds advanced in *The Armstrong* case. It is true that the court in *The St. Paul* did not go so far as *The Armstrong* case and actually recognized some of the errors of *The Armstrong* case. However, the essence of *The St. Paul* opinion was that the agreed valuation operated by estoppel. The court failed to appreciate the fact, now well settled, that the agreed valuation is only a stipulation for liquidated damages.

The Judge in the *St. Paul* case carefully confined his decision to partial loss cases, and indicated that as to total loss the rule would be different because in total loss cases, both of cargo and hull, the underwriters always pay the full amount of their policies. It was only because of a special practice in cases of partial loss to hull to repair the vessel that he differentiated the case from partial loss of cargo. That distinction does not apply in total loss of hull.

B. *The St. Johns was a logical outgrowth of the erroneous decision of The St. Paul.*

It will be observed that *The St. Paul* was not a case of subrogation and, therefore, is no authority in this case. Shortly after *The St. Paul,* however, a case of subrogation did come before the Southern District of New York. *The St. Johns,* 101 Fed. 469. In that case the agreed valuation was $20,000 and insurance policies were issued for that amount. The actual value was $60,000. There was a partial loss resulting from the collision amounting to $48,700. The owner filed a claim with the underwriters for the payment of the policy in full. The underwriters paid in full.

In subsequent litigation a decree was entered against the opposing vessel for the full damages amounting to $48,700. The owner of the opposing vessel, however, limited liability so that only $7,073.06 was recovered. The underwriters thereupon demanded the whole recovery. The owner contended that since the vessel was worth more than the agreed valuation, he was entitled to a share of the recovery.

In *The St. Johns* the owner in making a claim on the insurance policy asserted that the vessel was only worth the agreed valuation. The underwriters then paid the

owner on the basis of that assertion. The owner was not permitted after the recovery from the wrongdoer to change the asserted valuation.

The reasoning of *The St. Johns* is identical with the reasoning of *The St. Paul* and of *The Armstrong* case. As the Circuit Court of Appeals below said:

> "* * * Finally we are not convinced by the argument of Brown, J. in The St. Johns (D. C.) 101 F. 469, 473, that since in cases of full insurance the hull underwriter is wholly indemnified, the owner should not complain of the same result when he chooses to undervalue his ship and so to save premiums. That reasoning might indeed prevail in cases where the underwriter had been led to suppose that the agreed value was the full value, but that is never the case; at least it was not the case here. When it is not, there can be no inequity in letting in the owner as co-insurer, unless a contrary stipulation is to be implied in the policy; for the underlying understanding in any sort of insurance is that the insured is to be made whole at the insurer's expense; not that the insurer is to be preferred."

It appears that due to the inadvertent mistake of applying *The Armstrong* principle in a partial loss case, as was done in *The St. Paul,* there was some reason for the application of the doctrine to subrogation in a partial loss case, as in *The St. Johns.* It is not necessary, however, at this time to consider the validity of either *The St. Paul* or *The St. Johns,* or to deal at length with the rule in partial loss cases.

The courts have uniformly resisted the extension of the rule to any other type of case. This Court discountenanced the rule in cargo cases. *Gulf Refining Co.,* v. *Ins. Co., supra.*

The Circuit Court of Appeals for the Second Circuit has refused to apply the rule in total loss cases, and in many other types of cases, both in this country and in England, the rule has been discredited.

Since the agreed valuation has no practical effect in a total loss case, and since there is no legal justification for applying it to subrogation in any event, the doctrine advocated by the petitioners should be again condemned by this Court.

The rule that underwriters and owners under a valued policy are not co-insurers with respect to partial losses has been based on the fact that, in the case of partial loss to ships, the usual practice is for the assured to make repairs. His repair bill represents a sum of money which is the amount of his damage, ascertained without regard to the ship's value, and so the rule has been adopted as more convenient in practice than one requiring the determination of the sound value of the ship every time there is a partial damage. *Gulf Refining Co.* v. *Ins. Co.*, 279 U. S. 708, 713. In other words, partial losses of a ship are the same, whatever her value. The loss is determined not by her real or agreed value, but by the cost of the repairs. Hence it is clear that partial loss cases cannot be of any determinative assistance in the present controversy.

The decision of Judge Brown in *The St. Paul* and the decision of the Circuit Court of Appeals in *Gulf Refining Co.* v. *Ins. Co.*, 27 F. (2d) 678 and the decision of this Court in *Gulf Refining Co.* v. *Ins. Co.*, 279 U. S. 708, carefully point out that the reason for the rule in case of partial loss of hull is based solely on the custom adopted by underwriters and owners of measuring damages by repair bills. It is a rule of convenience.

The Courts in those decisions carefully limit the rule to cases of partial loss of hull, because of the exceptional circumstance that in such cases the repair bill is taken as the measure of loss.

The agreed valuation has the same effect in case of total loss of hull or cargo. In either case the assurers pay the amount of their policies and the owners bear any loss in addition to the agreed valuation, or the amount of the policies, as co-insurers. The rule in hull partial loss cases, therefore, is based on narrow peculiar circumstances, which have no application to a case of total loss. Every argument advanced by the petitioners was advanced in *Gulf Refining Co.* v. *Ins. Co.*, 279 U. S. 708, and all were refuted by this Court. It is submitted that that decision is authoritative on the question here presented and that the decision below should be affirmed.

LAST POINT.

PETITIONERS' ASSERTIONS OF CONFLICT WITH ENGLISH LAW AND ESTABLISHED UNDERWRITING PRACTICES ARE BASELESS.

Petitioners assert that our law should conform with English law. Since there is no English case involving facts similar to this case, or *The Livingstone*, it is impossible to know what an English Court would hold in a case of total loss, where recovery from wrongdoer exceeds the agreed valuation. We submit that the dictum of *The Armstrong* case, relied on by petitioners, would not be followed by English Courts. That dictum has been so discredited in English decisions that it cannot be held to reflect prevailing English law.

Petitioners attempt to describe an underwriting practice or custom which in some way adds color to their claim. Analysis of this attempted creation of an "underwriting practice" shows that it is but an assertion of discredited legal principles condemned by the Court below.

The basic argument is that in partial loss cases, the hull underwriter pays the whole repair bill under *The St. Paul.* The petitioners, at page 43 of their brief, almost question that decision, just as this Court did in *Gulf Refining Co.* v. *Ins. Co., supra.* But whether *The St. Paul* is sound or not is irrelevant here, because it was based on the exceptional fact that in partial loss cases underwriters and owners measured the loss by repair bills as a matter of mutual convenience. It was an exception to all rules of insurance. In case of total loss, either of cargo or hull, no such exceptional rule exists. Underwriters pay for the total loss in the normal course. Subrogation, therefore, operates in its normal way to give the assured indemnity first, and to prevent his getting more than indemnity. This is the legal underwriting practice. Petitioners describe the reverse as "conventional".

Associated with that discussion of the partial loss rule, as evidence of custom, is a long essay on the subject of P. P. I. insurance. It is asserted that shipowners take out P. P. I. insurance in which P. P. I. underwriters waive subrogation, so that the assured will not be underindemnified if basic hull underwriters are first indemnified out of any recovery.

The only possible basis for the assertion of such alleged custom in the record is the following statement in the answer (R. 16):

> "In addition to the policies of insurance referred to in Paragraph 3 of the complaint, the defendant also, in accordance with the customary practice, procured other policies of insurance upon the *S. S. Almirante* for increased valuation in the sum of £65,105,[1] which additional insurance covered only against total and/or constructive total loss and was permitted by the terms of the hull policies."

The evidence of custom relied on by petitioners is entirely contrary to the practice they describe, because increased value hull insurance shares in subrogation with agreed value hull underwriters! This Court has but recently noted the rule. *Standard Marine Ins. Co., Ltd.* v. *Assur. Co., Ltd.*, 283 U. S. 284, 290, discussing *Brown* v. *Merchants' Marine Ins. Co.*, (C. C. A. 9) 152 Fed. 411. The statement refers only to "increased value" insurance such as was involved in the *Brown* case.

If the United Fruit Company had the right, as it expressly did under the terms of the policies, to take out additional insurance above the agreed valuation, which insurance would have shared with the original agreed value hull underwriters in any recovery from a wrongdoer, then clearly any person who assumed the risk above the agreed valuation was a co-insurer above that valuation with the hull underwriters.

Petitioners truly assert, and their original forms of policy illustrate, that ordinarily underwriters are concerned with the character of their assured's additional insurance above the agreed value, because of the possibility of negligence or fraud on the part of an owner who might

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[1] As we noted, *supra*, page 7, part of this insurance was on interests other than hull.

profit from the loss. But petitioners here, possibly out of the high regard they expressed in the trial court for respondent, and its adjusters, were not so concerned about respondent. They expressly promised to pay the repair bill, up to the amount of their policies, in case of partial loss, and expressly gave respondent complete liberty to protect itself in case of total loss by any obtainable insurance or to carry the risk itself (*supra*, pp. 12, 13). Under the *Brown* case, *supra*, such additional insurance shared in subrogation equally with the other hull underwriters notwithstanding the agreed value clause.

Respondent was given absolute liberty as to insurance of increased valuation. It was not limited to any form of insurance. Assured is described by petitioners as one of the oldest and largest American shipowners. It could well have been a self-insurer as to the balance of its interest in the *Almirante*.

Respondent might have taken out "increased valuation" insurance as in the *Brown* case for the full amount of its interest in the *Almirante*, in which case petitioners would have had to share the recovery from the United States, just as they do now.

Respondent might have taken out American total loss "P. P. I." insurance. Since respondent had a real insurable interest, such insurance would have been perfectly legal in this Country. Mr. Justice Story, *Alsop* v. *Commercial Ins. Co.*, Fed. Cas. No. 262. Respondent could have collected on such insurance and P. P. I. underwriters could have shared in subrogation with petitioners. *Frank B. Hall & Co.* v. *Jefferson Ins. Co.*, (S. D. N. Y.) 279 Fed. 892.

It is conceded that respondent could have insured its additional interest, P. P. I. in England, underwriters waiv-

ing salvage as they did. Petitioners did not care what respondent did; they relied on respondent's reputation as a protection against the only fear underwriters have, fraud or negligent operation—a not misplaced confidence in this case.

Petitioners contracted to permit respondent to protect its additional interest in the *Almirante* in any of the above ways—there may be more. Petitioners now attempt to amend their contract to read that respondent agreed to indemnify petitioners first and bear any resulting deficiency —because petitioners had waived the usual protective measures against fraud or negligent operation.

Avoidance of underwriting contracts, decisions demonstrate, is often attempted by assertion of "customs" or "practices." Petitioners' allegation of custom in this case is not only lacking in support even by a single witness, but is refuted as a matter of fact by decisions.

RESPONDENT HAS NEVER BEEN INDEMNIFIED FOR THE LOSS OF THE *S. S. Almirante*. THERE IS, THEREFORE, NO REASON FOR ADDITIONAL SUBROGATION. THE DECISION OF THE CIRCUIT COURT OF APPEALS SHOULD BE AFFIRMED.

Respectfully submitted,

CLETUS KEATING,
RICHARD SULLIVAN,
Counsel for Respondent.

New York, N. Y.
April 18, 1938.

p. 6,

SUPREME COURT OF THE UNITED STATES.

Nos. 773, 774, 775.—October Term, 1937.

Aetna Insurance Company, Petitioner,
773 *vs.*
United Fruit Company.

Union Marine & General Insurance Company, Ltd., formerly Union Marine Insurance Company, Ltd., Petitioner,
774 *vs.*
United Fruit Company.

Boston Insurance Company, Petitioner,
775 *vs.*
United Fruit Company.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 23, 1938.]

Mr. Justice Stone delivered the opinion of the Court.

The question for decision is how far hull insurers upon a valued marine insurance policy are entitled, in case of total loss, to participate by way of subrogation in a recovery by the insured against a tortfeasor responsible for the loss.

In 1918 petitioners, with several other underwriters, insured the hull of respondent's vessel, the "Almirante", by policies in which it was agreed that the value of the hull was $632,610, materially less than its true value. The policies provided for a stipulated indemnity to the owner "irrespective of the value of the vessel", and that the owner was free to effect other insurance to any amount and without disclosure of the amounts so insured. As the total of the valued policies was $582,002.25, respondent was co-insurer for about $50,000; and so far as the valued hull policies were concerned it was uninsured, to the extent of any loss, in excess of the stipulated value. As protection against these risks, respondent procured from English underwriters additional P. P. I. (policy

proof of interest) insurance, aggregating £65,105, partly upon hull and partly against other losses incidental to total loss of the vessel. The P. P. I. policies waived all rights of subrogation and were "honor" policies, concededly payable only at the option of the insurers because unenforceable under the Act of Parliament of December 31, 1906, § 4. *Edwards & Co.* v. *Motor Union Insurance Co.*, [1922] 2 K. B. D. 249.

In 1918 the "Almirante" became a total loss as the result of a collision with the S. S. "Hisko", a vessel belonging to the United States Government. The underwriters of both the valued policies and the P. P. I. policies paid them in full. The former joined with respondent in retaining attorneys to press the claims for collision damages against the United States. Suit brought against the United States under a special act of Congress, resulted in a recovery which included $1,750,000 as the value of the vessel, but without interest since the act did not authorize allowance of interest. Compare *Boston Sand and Gravel Co.* v. *United States*, 278 U. S. 41, 47. Distribution of the proceeds of the suit was made in accordance with a computation by insurance adjusters who apportioned the expenses of the suit among respondent and the underwriters, and allotted to the latter the amounts they had paid on their policies without interest, less their respective shares of the expenses.

Petitioners, who are underwriters on some of the valued hull policies, brought the present suit in the district court for southern New York to participate in respondent's recovery against the United States. Relying on the valuation clause of their policies as conclusively fixing the value of the vessel for all purposes of the adjustment, they contest the allotment, insisting that they should bear no part of the expenses, and that they are entitled to interest on the amounts of their policies from the several dates on which they were paid. They also make, but do not stress here, the point that the hull insurers are entitled to the whole recovery. The district court gave judgment for the full amount which petitioners had paid on their policies without deduction for expenses, but without addition of interest. 18 Fed. Supp. 441. On appeal by both parties, the Court of Appeals held that petitioners were entitled to neither interest nor expenses, and modified the judgment accordingly. 92 F. (2d) 576. We granted certiorari, — U. S. —, be-

cause of the admitted conflict of the decision below with that of the Court of Queen's Bench in *North of England, etc., Insurance Ass'n.* v. *Armstrong* (1870) L. R. 5 Q. B. 244. See *Queen Insurance Co.* v. *Globe & Rutgers Fire Insurance Co.*, 263 U. S. 487, 493; *Gulf Refining Co.* v. *Atlantic Mutual Insurance Co.*, 279 U. S. 708, 715.

Petitioners' argument turns upon their contention that the valuation clause, either by estoppel or by contract, is conclusive between the parties for all purposes and that as respondent has recovered from the Government more than the stipulated value of the vessel, petitioners are entitled to the benefit of the recovery, at least to the full extent of the payments on their policies with interest. We think that the valuation clause in its usual form does not operate as an estoppel or by agreement to foreclose proof that actual value exceeds agreed value when the question is of the insurer's right to subrogation. The application of the agreed value to the insurance adjustment does not depend upon estoppel, *Gulf Refining Co.* v. *Atlantic Mutual Insurance Co., supra*, 712; *British & Foreign Marine Insurance Co.* v. *Maldonado & Co.*, 182 Fed. 744, and there can be no basis for an estoppel at least where, as here, the policy provisions undertake to indemnify the insured irrespective of the value of the vessel and contemplate that the insured may effect other insurance. The valuation stipulation fixes in advance of loss the value of the vessel, so as to avoid the necessity of proof of value in order to establish the extent of the liability assumed on the policy. The agreed value, honestly arrived at, thus stands in the place of prime value under an open marine policy, *Gulf Refining Co.* v. *Atlantic Mutual Insurance Co., supra*, 711; *St. Paul Fire & Marine Insurance Co.* v. *Pure Oil Co.*, 63 F. (2d) 771, and resembles, in its practical operation, a stipulation for liquidated damages.

But beyond its controlling effect in determining the insurance liability, the clause does not operate to exclude proof of actual value when relevant. Even in an action on the policy the actual rather than the agreed value has been held to be controlling for the purpose of determining whether there is a constructive total loss. *Bradlie* v. *Maryland Insurance Co.*, 12 Pet. 378, 399; *Irving* v. *Manning*, 6 C. B. 391 (H. of L.). In the case of partial insurance of cargo under a valued policy the insured is treated as a co-insurer and is allowed to recover on the policy only such propor-

tion of the loss as the insured value bears to the actual value, a computation which necessarily requires proof of the actual value in order to establish the co-insurance relationship. *Gulf Refining Co.* v. *Atlantic Mutual Insurance Co., supra,* 710-711; see *International Navigation Co.* v. *Atlantic Mutual Insurance Co.,* 100 Fed. 304, 318, aff'd. per curiam 108 Fed. 987; Arnould on Marine Insurance, 11th Edition, § 340; Eldridge on Marine Policies, 2nd Edition, p. 90. It is true, as was pointed out in *Gulf Refining Co.* v. *Atlantic Mutual Insurance Co., supra,* that in case of valued hull policies losses resulting in repairs are customarily paid in full, not because of agreement or estoppel but because partial losses to hull usually result in repairs without any valuation of the hull and the rule that the recovery shall be measured by repairs has been found more convenient in practice than one requiring determination of the sound value of the ship. See *Lohre* v. *Aitchison,* L. R. 2 Q. B. D. 501, 507. The same rule as in the case of cargo insurance has been applied when repairs were not made, and value was established by the sale of the vessel, *Pitman* v. *Universal Marine Insurance Co.,* L. R. 9 Q. B. D. 192, and in the case of general average contribution by the hull. *S. S. "Balmoral" Co.* v. *Marten,* [1902] App. Cas. 511, 514, 515. The peculiar rule of the insurer's liability for partial loss to hull when repairs are made does not depend on the valuation clause and affords no basis for treating it as excluding the insured as co-insurer when there is a total loss.

These variations in the effect of the valuation clause, in fixing the liability of the insurer, do not alter the character of the valued policy as a contract of indemnity, or afford any basis for alteration of his rights as an indemnitor. Whether upon a valued or an open policy, he is entitled to share in the insured's recovery of damages only by way of subrogation, whose sole object and justification is to make indemnity to the insured up to the amount of the policy, the measure of the liability of the insurer. *Standard Marine Insurance Co.* v. *Scottish Metropolitan Assurance Co.,* 283 U. S. 284, 288; *Aetna Casualty & Surety Co.* v. *Phoenix National Bank & Trust Co.,* 285 U. S. 209, 214; *Chapman* v. *Hoage,* 296 U. S. 526, 531. The doctrine now contended for, would require a radical departure from the principle on which subrogation is founded. Consistently applied, it would in some cases deprive the insured of indemnity, and indeed might enable the insurer to make a profit by recovering more from the insured than the

amounts paid on the policy. We are unable to sanction a doctrine involving such consequences.

No question is raised by the petition for certiorari or appears to have been raised below as to the correctness of the adjustment statement, if the valuation clause does not foreclose proof of actual value and if respondent is therefore to be regarded as a co-insurer of the hull in event of total loss. Petitioners make no contention that respondent, if so regarded, has received more than appropriate indemnity after the distribution of the proceeds of the collision suit. The total insurance received by respondent from the insurers in 1918 and 1919, aggregating $886,068, was approximately $863,932 less than the prime value of the vessel which some thirteen years later it recovered in the collision suit, without allowance of interest and after the expenditure of more than $300,000 as costs of the litigation. Petitioners submit no interest computations and have otherwise made no effort to sustain the burden of proving that respondent has received more than indemnity for the delay in payment of as much of the loss as was not covered by insurance.

Since the expenses have been apportioned by charging the insured with a proportion greater than its share of the risk, and the apportionment is not assailed except as it may be wholly precluded by the valuation clause, it is unnecessary to consider whether the distribution of expense should be upon principles of co-insurance or whether the insured should be fully indemnified for it before the insurer is entitled to subrogation.

Petitioners point to no practice of underwriters with respect to the valued policy or its rate of premium as compared with that for the open policy, which supports the rule for which they contend. But they insist that it has been adopted in England and has become so well settled in New York where the insurance was effected, that it must be taken to be an implied term of the policies. It is true that *North of England, etc., Insurance Ass'n.* v. *Armstrong, supra,* lends support to petitioners' argument. There, upon a total loss, the insured had recovered as collision damages an amount less than the agreed valuation and it was held that the insurer, who had paid the policy in full, was entitled to have the benefit of the entire recovery. The court thought that the case was analogous to that of abandonment in case of a constructive total loss where the underwriter, by

virtue of the abandonment, is entitled to the wreck and to such profit from it as he can make. Pursuing the logic of its reasoning, the court declared that the insurer would have been entitled to the insured's full recovery even if it exceeded the agreed value. But it seems plain that there is no analogy between the insurer's right to be subrogated to the fruits of the insured's recovery from a wrongdoer and the insurer's right to a wreck which is his by abandonment. *The Potomac,* 105 U. S. 630, 634; *The St. Johns,* 101 Fed. 469, 472 (S. D. N. Y.); Arnould on Marine Insurance, 11th Edition, §§ 1228-1230.

North of England, etc., Insurance Ass'n. v. *Armstrong, supra,* was cited in *The Potomac, supra,* 635, and in *Mobile & Montgomery R. Co.* v. *Jurey,* 111 U. S. 584, 594, 595, neither of which involved the question now presented. It was followed in *The St. Johns,* but not to the extent of allowing a profit to the insurer. In *The Livingstone,* 130 Fed. 746 (C. C. A. 2), the claim of a valued hull insurer to the whole collision recovery, which exceeded the agreed value, was denied upon reasoning which rejected that of *North of England, etc., Insurance Ass'n.* v. *Armstrong, supra,* and *The St. Johns, supra,* and calls for affirmance of the judgment here. Interest was allowed to the insurer, apparently because interest on the full value of the vessel had been recovered in the damage suit. Without discussing the point the court by its mandate directed payment to the underwriters of the full amount of their policies without deduction for expenses. But as it considered that the ~~insured's~~ insurer's right of recovery rested upon subrogation unaffected by the valuation clause, we cannot regard the case as an intentional departure from the rule that the insurer is entitled to subrogation only after the insured is appropriately indemnified or as establishing any rule that the valuation clause forecloses proof of actual value as a step in measuring the insurer's recovery by way of subrogation.

We recognize that established doctrines of English maritime law are to be accorded respect here, *Queen Insurance Co.* v. *Globe & Rutgers Fire Insurance Co., supra,* 493; *Gulf Refining Co.* v. *Atlantic Mutual Insurance Co., supra,* 715, but the pronouncement in *North of England Insurance, etc., Ass'n.* v. *Armstrong, supra,* has never been adopted by an English appellate court. It was doubted by eminent judges in *Burnand* v. *Rodocanachi,* [1882] L. R. 7 App. Cas.

333, 342, and in *Thames & Mersey Marine Ins. Co.* v. *British & Chilean S. S. Co.*, L. R. 2 K. B. 214, 221. Its reasoning, conflicting as it does with established principles of maritime insurance law, and found to be incapable of consistent application both in *The St. Johns*, *supra*, 474-475, and in *The Livingstone*, *supra*, 750, should be rejected here.

Affirmed.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.